Effective relief regarding residential property following a failure to execute an eviction order

by
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Summary

The eviction process relating to immovable property utilised for residential purposes can broadly be subdivided into three phases: the procedural; adjudicatory and execution phases, respectively. The procedural stage is characterised by the necessary procedural steps that need to be taken by an owner (or person in charge) or organ of State, in accordance with the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("PIE") in order to launch an application for eviction of unlawful occupier(s) from private or public land. The adjudicatory phase entails a substantive determination by the courts whether it is appropriate, just and equitable, after considering all the relevant circumstances of the case as required by PIE, to grant an eviction order. The execution phase is only applicable when an eviction order was granted by the court. In line with PIE, just and equitable dates, depending on the facts and circumstances of the matter, are also set for (a) eviction; and (b) the execution of the eviction order. Where the land or property is vacated voluntarily on the date set, the eviction process is complete. However, when the land or property is not vacated as required, the eviction order is executed on the further date, as set out in the eviction order. This execution phase is invariably effected with the assistance of the South African Police Force or other State agents or officials and involves the removal of unlawful occupiers from the land or property in question.

However, failure by the State to execute eviction orders has become more prominent and therefore, increasingly, contentious. As a result, the land owner is left without a remedy to protect his or her right to property, whereas the unlawful occupier's position, with regard to access to land and adequate housing, remains *in limbo* - leaving both parties without an effective remedy.

In light of the above, the objective of this study is twofold. Firstly, the research sets out to establish *what* constitutes effective relief regarding residential property, following a failure to execute an eviction order granted in terms of PIE. In this regard, effective relief, in the context of evictions pertaining to residential property, constitutes appropriate relief for all affected parties that can be executed within a *reasonable* time. Secondly, the aim is to analyse whether or to what extent a structural interdict; constitutional damages and/or a contempt of court order could be regarded as effective relief, both from the perspective of the land owner and the unlawful

occupier(s), given the conflicting rights and interests of the respective parties. The thesis also considers the role and involvement of the State as a facilitator and/or as an owner in the process of eviction in order to determine what would be regarded as effective relief from that perspective. The impact of the respective remedies on the abovementioned parties is analysed in order to determine whether the relief granted can be regarded as "effective relief" relating to residential property, following a failure to execute an eviction order.

In this regard various recommendations are suggested, relating to the choice of oversight model and the formulation of the structural interdict. In relation to alternative relief, it is suggested that PIE either be amended or that a framework for direct constitutional damages be developed by the courts. Presently, and in conclusion, it is clear that a combination of remedies may need to be employed in order to provide effective relief where eviction orders are not executed.

Opsomming

Uitsetting vanaf onroerende eiendom wat vir residensiële doeleindes aangewend word, behels drie fases: die prosedurele, beregtings- en uitvoeringsfases onderskeidelik. Die prosedurele fase word gekenmerk deur die nodige prosedurele stappe wat deur ‘n privaat- of Staatsgrondeienaar geneem moet word, ooreenkomstig die Wet op die Voorkoming van Onwettige Uitsetting en Onregmatige Okkupasie van Grond 19 van 1998 (“Uitsettingswet”), ten einde ‘n uitsettingsaansoek vir die uitsetting van onregmatige okkupeerders vanaf openbare of privaatgrond te loods. Die beregtingsfase behels ‘n substantiewe ondersoek deur die howe ten einde te bepaal of ‘n uitsettingbevel toepaslik, regverdig en billik, na oorweging van alle relevante omstandighede - soos vereis deur die Uitsettingswet, sal wees. Die uitvoeringsfase is slegs van toepassing indien ‘n uitsettingsbevel inderdaad toegestaan is. Soos vereis in die Uitsettingswet word regverdige en billike datums gestel vir (a) uitsetting; en (b) die uitvoering van die uitsettingsbevel. Waar die grond of eiendom op vrywillige basis deur die onregmatige okkupeerders ontruim word, is die uitsettingsproses voltooid. Waar die grond of eiendom egter nie op die datum soos vasgestel deur die hof ontruim word nie, word die uitsettingsbevel op die latere datum, soos uiteengesit in die uitsettingsbevel, uitgevoer. Die uitvoeringsfase word gewoonlik met behulp van die Suid-Afrikaanse Polisiemag of ander Staatsagente of -beamptes hanteer en behels die verwydering van die onregmatige okkupeerders vanaf die relevante grond of eiendom.

Versuim deur die Staat om uitsettingsbevele uit te voer het gaandeweg meer prominent geword en dus toenemend omstrede. In hierdie omstandighede is ‘n grondeienaar weerloos gelaat om sy of haar regte in eiendom te beskerm, terwyl onregmatige okkupeerders se toegang tot grond en behuising ook nie beredder is nie. Dienooreenkomstig is beide die grondeienaar en onregmatige okkupeerders sonder effektiewe remedies gelaat.

Die oogmerk van die studie is gevolglik tweeledig. Eerstens, beoog die studie om vas te stel wat onder “effektiewe regshulp” verstaan word in gevalle waar die Staat versuim om ‘n uitsettingsbevel by residensiële eiendom uit te voer. In hierdie konteks kan

effektiewe regshulp (of effektiewe remedie) beskou word as gepaste regshulp vir alle betrokke partye wat binne ‘n redelike tydperk uitgevoer kan word.

Die tweede oogmerk is om ondersoek in te stel na die vraag of en in welke mate ‘n strukturele interdik, grondwetlike skadevergoeding en/of ‘n bevel vir minagting van die hof as effektiewe regshulp beskou kan word. Hierdie ondersoek word gedoen vanuit die onderskeie perspektiewe van beide die grondeienaar en onregmatige okkupeerder(s), gegewe hul botsende regte en belange. Die tesis oorweeg ook die rol en betrokkenheid van die Staat as fasiliteerder en/of as grondeienaar gedurende die uitsettingsproses ten einde vas te stel wat moontlik as ‘n effektiewe remedie vanuit daardie perspektief geag kan word. Die impak van die onderskeie remedies op die bogenoemde partye word gevolglik ontleed ten einde die oorhoofse navorsingsvraag te beantwoord, naamlik of sodanige regshulp “effektiewe regshulp” daarstel waar daar ‘n versuim was om ‘n uitsettingsbevel ten opsigte van residensiële eiendom uit te voer.

In hierdie verband word verskeie aanbevelings, wat verband hou met die keuse van model vir toesighouding en die fomulering van die strukturele interdik, voorgestel. Ten aansien van alternatiewe regshulp, word voorgestel dat PIE gewysig word of dat ‘n raamwerk vir direkte grondwetlike skadevergoeding ontwikkel word. Dit is tans duidelik dat ‘n kombinasie van remedies nodig mag wees ten einde effektiewe regshulp te verleen waar daar ‘n versuim was om ‘n uitsettingsbevel uit te voer.

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The two-year-end is no longer in sight. The end is here and it feels glorious.

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1 Introduction

The eviction process relating to immovable property utilised for residential purposes can broadly be subdivided into three phases: the procedural; adjudicatory and execution phases, respectively. The procedural stage is characterised by the necessary procedural steps that need to be taken by an owner (or person in charge) or organ of State, in accordance with the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("PIE") in order to launch an application for eviction of unlawful occupier(s) from private or public land.[1] The adjudicatory phase entails a substantive determination by the courts[2] whether it is appropriate, just and equitable, after considering all the relevant circumstances of the case as required by PIE,[3] to grant an eviction order. The execution phase is only applicable when an eviction order was granted by the court. In line with PIE, just and equitable dates, depending on the facts and circumstances of the matter, are also set for (a) eviction;[4] and (b) the execution of the eviction order.[5] Where the land or property is vacated voluntarily on the date set, the eviction process is complete. However, when the land or property is not vacated as required, the eviction order is executed on the further date, as set out in the eviction order. This execution phase is invariably effected with

[1] Sections 4(1)-(5), 5(2), 6(4) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 respectively, depending on whether the eviction application was lodged by private parties, on an urgent basis or by an organ of State. See also *Ndlovo v Ngcobo and Bekker v Jika* 2003 1 SA 113 (SCA) para 23 specifically; JM Pienaar *Land Reform* (2014) 720-723, 734; G Muller *The impact of section 26 of the Constitution on the Eviction of Squatters in South African Law* LLD Stellenbosch University (2011) 114-115; AJ van der Walt & GJ Pienaar *Introduction to the Law of Property* 7 ed (2016) 373-374.

[2] *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 33. See also Pienaar *Land Reform* 482 where she states that even if all the procedural requirements have been met, a court may still refuse to grant an eviction order on the basis that it is not just and equitable in the circumstances of the case to do so. See for example *Pitje v Shibambo* 2016 4 BCLR 460 (CC); *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 6 SA 294 (SCA); *Mahogany Ridge 2 Property Owners Association v Unlawful Occupiers of Lot 13113 Pinetown* 2013 2 All SA 236 (KZD); *Johannesburg Housing Corporation (Pty) Ltd v The Unlawful Occupiers of the Newtown Urban Village* 2013 1 SA 583 (GSJ). See also in general S Liebenberg *Socio-Economic Rights: Adjudication under a transformative Constitution* (2010) 268-316, 349-351.

[3] Sections 4(6)-4(8), 5(1) and 6(3) respectively of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998; *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) paras 33-36; Pienaar *Land Reform* 749-765 for a discussion on the approach to "just and equitable" and the factors and considerations that a court may take into account when deciding whether to grant an eviction order. See also J van Wyk "The role of local government in evictions" (2011) 14 *PELJ* 55-57 and G Muller "On considering alternative accommodation and the rights and needs of vulnerable people" (2014) 30 *SAJHR* 41-62.

[4] Section 4(8)(a) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998. See Pienaar *Land Reform* 725-727.

[5] Section 4(8)(b) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998. See Pienaar *Land Reform* 725-727.

the assistance of the South African Police Force or other State agents or officials and involves the removal of unlawful occupiers from the land or property in question.[6]

2 Research problem

2 1 Introduction

Failure by the State to execute eviction orders has become more prominent and therefore, increasingly, contentious.[7] Mbazira acknowledges that the reluctance of State officials to adhere to the rule of law and respect court orders forms part of the reasons why there has been a failure to implement court orders.[8] However, he also attributes the failure to the deficiencies in the court's approach.[9] Mbazira identifies a list of contributing factors for the failure to execute court orders. These include a lack of transparency and consultation in the execution of court orders; an absence of inter-governmental cooperation and coordination where participation of more than one sphere of government is required to execute court orders and generally incapacity to carry out socio-economic reform.[10] Incapacity, in terms of providing adequate housing has made timely delivery of quality housing very difficult.[11]

[6] Section 205(3) of the Constitution of the Republic of South Africa, 1996 read with section 14 of the South African Police Service Act 65 of1995.

[7] C Mbazira *You are the "weakest link" in realising socio-economics rights: Goodbye: Strategies for effective implementation of court orders in South Africa* (2008) vi; C Mbazira "Non-implementation of court orders in socio-economic rights litigation in South Africa: Is the cancer here to stay?" (2008) 9 *ESR Review* 2-8. See for example *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2011 7 BCLR (CC); *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) and *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* 2015 6 BCLR 711 (CC). These cases are discussed in Chapter 2, 3 and 4 respectively. See also E MacDonnell Chilemba "Evictions in South Africa during 2014 - an analytical narrative: feature" (2015) 16 *ESR Review* 3-6.

[8] Mbazira *Strategies for effective implementation* vi.

[9] Mbazira *Strategies for effective implementation* vi where he states that the court's reluctance to use the structural interdict is reason for the failure to execute court orders.

[10] Mbazira *Strategies for effective implementation* vi. See in general Van Wyk (2011) *PELJ* 50-83; JM Pienaar & H Mostert "Uitsettings onder die Suid-Afrikaanse grondwet: die verhouding tussen artikel 25(1), artikel 26(3) en die Uitsettingswet (slot)" (2006) 3 *TSAR* 522-536.

[11] Mbazira *Strategies for effective implementation* vi.

As a result, the land owner is left without a remedy to protect his or her right to property,[12] whereas the unlawful occupier's position, with regard to the acquisition of land[13] and adequate housing,[14] remains *in limbo*.[15]

2 2 The right to effective relief

> "There can to my mind be no doubt that the authors of the Constitution intended that those rights (that is, the rights entrenched in the Constitution) should be enforced by the courts of law. They could never have intended to confer a right without a remedy. The remedy is, indeed, part and parcel of the right. *Ubi jus, ibi remedium*".[16]

The well-known principle *ubi jus, ibi remedium* captures the simple yet fundamental idea that rights are of little value absent a remedy that can be executed.[17] The principle warrants that a remedy must either be found or forged[18] by the courts where there is a proven violation of a person's right.[19] In this regard, the South African courts are mandated to grant appropriate and effective relief where it has been established that a constitutional right has been infringed,[20] and the State has a corresponding

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[12] Section 25(1) of the Constitution of the Republic of South Africa, 1996. See in general AJ van der Walt *Constitutional Property Law* 3 ed (2011) 17-18 and T Roux "Property" in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (OS 12 2003) 41-1-41-37.

[13] Section 25(6) of the Constitution of the Republic of South Africa, 1996. See in general Pienaar *Land Reform* 378-509; JM Pienaar & J Brickhill "Land" in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (OS 3 2007) 48-25-48-52 and J van Wyk "The relationship (or not) between the rights of access to land and housing: de-linking land from its components" (2005) 16 *Stell LR* 466-487.

[14] Section 26(1) of the Constitution of the Republic of South Africa, 1996. See in general *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC); Liebenberg *Socio-Economic Rights* 344-351; Muller *The impact of section 26 of the Constitution* 75-82; K McLean "Housing" in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (OS 7 2006) 55-8-55-14.

[15] M Kruger "Arbitrary deprivation of property: an argument for the payment of compensation by the state in certain cases of unlawful occupation" (2014) 131 *SALJ* 328 330; G Muller & S Liebenberg "Developing the law of joinder in the context of evictions of people from their homes" (2013) 59 *SAJHR* 554 555; S Wilson "Breaking the tie: Evictions from private land, homelessness and a new normality" (2009) 126 *SALJ* 270-290; Pienaar & Mostert (2006) *TSAR* 522-536.

[16] *Minister of the Interior v Harris* 1952 4 SA 769 (A) 781. See also *Fose v Minister of Safety and Security* 1997 7 BCLR (CC) para 69; Kruger (2013) *SALJ* 358.

[17] *Minister of the Interior v Harris* 1952 4 SA 769 (A) 781; *Fose v Minister of Safety and Security* 1997 7 BCLR (CC) para 69; Kruger (2014) *SALJ* 358. See also article 6, the right to a fair trial of the European Convention on Human Rights which holds that "[E]veryone is entitled to a fair and public hearing within a *reasonable time* by an independent and impartial tribunal established by law" read with section 13, the right to an effective remedy which provides that "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

[18] M Bishop "Remedies" in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2ed (RS 6 2014) 9-6.

[19] Mbazira *Strategies for effective implementation* 5.

[20] Section 38 read with section 172(1)(b) of the Constitution of the Republic of South Africa, 1996; *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) paras 18 and 33. See also *Fose v Minister of Safety and Security* 1997 7 BCLR (CC) para 69; Bishop "Remedies"

obligation to ensure the effectiveness of the order granted by the court[21] "for without…remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced".[22] Absent an effective remedy, it is not only the right itself which is rendered trivial but also the values underlying the Constitution.

The absence of an effective remedy may give rise to further constitutional breaches. The court will be in breach of its constitutional duty to grant litigants appropriate and effective relief as guaranteed in the Constitution.[23] The State will not only be in breach of its obligation to "respect, protect, promote and fulfil the rights in the Bill of Rights"[24] but it will also be in breach of its constitutional duty to provide measures to ensure the effectiveness of an order granted by the court[25] which will ultimately result in an infringement of the right to access to courts.[26] These constitutional breaches are incompatible with the rule of law[27] as one of the founding values of the South African Republic and threaten the South African constitutional dispensation.

Therefore, it is essential that relief, which can be executed, be found or forged.[28] In this regard, it is the role of the courts to determine *what* would constitute appropriate and effective relief in a particular case[29] and it is the State's role to ensure that the relief granted is executed. This requires a remedial norm embracing affirmative judicial

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in *CLOSA* 9-65-9-78; Mbazira *Strategies for effective implementation* 5; Liebenberg *Socio-Economic Rights* 377-461.

[21] Section 34 read with section 165(4) of the Constitution of the Republic of South Africa, 1996; *Modderklip Boerdery (Edms) Bpk v President van die Republiek van Suid-Afrika* 2003 1 All SA 465 (T) para 43.

[22] *Fose v Minister of Safety and Security* 1997 7 BCLR (CC) para 69; Bishop "Remedies" in *CLOSA* 9-65-9-78; Mbazira *Strategies for effective implementation* 5.

[23] Section 38 read with sections 164, 165, 172 and 173 of the Constitution of the Republic of South Africa, 1996; *Fose v Minister of Safety and Security* 1997 7 BCLR (CC) para 69 where the court held that "this Court has a particular duty to ensure that within the bounds of the Constitution effective relief be granted for the infringement of any rights entrenched in it". See also Bishop "Remedies" in *CLOSA* 9-65-9-78; Mbazira *Strategies for effective implementation* 5; Liebenberg *Socio-Economic Rights* 377-461.

[24] Section 7(2) of the Constitution of the Republic of South Africa, 1996; Liebenberg *Socio-Economic Rights* 82-87, 344-347; S Viljoen "The systemic violation of section 26(1): An appeal for structural relief by the judiciary" (2015) 30 *SAPL* 44-46.

[25] Section 34 read with section 165(4) of the Constitution of the Republic of South Africa, 1996; *Modderklip Boerdery (Edms) Bpk v President van die Republiek van Suid-Afrika* 2003 1 All SA 465 (T) para 43; M Euijen & C Plasket "Constitutional Protection of Property and Land Reform" (2005) *ASSAL* 402-415.

[26] A Pillay "South Africa: Access to land and housing" (2007) 5 *IJCL* 544-545.

[27] Section 1(c) of the Constitution of the Republic of South Africa, 1996.

[28] *Fose v Minister of Safety and Security* 1997 7 BCLR (CC) para 69; Bishop "Remedies" in *CLOSA* 9-65-9-78; Mbazira *Strategies for effective implementation* 5.

[29] *Fose v Minister of Safety* 1997 7 BCLR (CC) para 18.

action[30] in conjunction with the State providing reasonable mechanisms in ensuring the execution of court orders.[31]

2 3 Appropriate and effective relief

Although courts are inclined to use "appropriate" and "effective" relief interchangeably it is posited that there is indeed a distinction to be drawn between the two phrases. This is the case because "the enforcement of constitutional rights in South Africa faces two formidable challenges. The first challenge is devising appropriate, just and equitable relief in response to violations of constitutional rights".[32] *Appropriate* relief will in essence be a remedy that is just and equitable in the circumstances for all the affected parties.[33] When determining whether a remedy is "appropriate", it is necessary to strike a balance between the competing rights and interests of the affected parties.[34] In the context of adjudicating eviction applications, this would entail a substantive determination by the court, in accordance with PIE,[35] whether or not it

[30] TA Thomas "*Ubi Jus Ibi Remedium*: The Fundamental Right to a Remedy Under Due Process" (2004) 41 *San Diego LR* 1633 1633-1634 where it is explained that "affirmative judicial action" entails action by the court in the form of a powerful remedy such as a mandatory injunction (i.e. structural interdict) that would compel constitutionally-required change in order to provide meaningful relief to litigants and society as a whole. See also M Swart "Left out in the cold? Crafting constitutional remedies for the poorest of the poor" (2005) 21 *SAJHR* 215 215 where the author equates affirmative judicial action with providing "affirmative remedies including declarations, *damages*, reading in, *mandatory interdicts and structural interdicts*. Of these, *constitutional damages* and *structural interdicts* are particularly suitable as remedies that would increase government accountability" (my emphasis).

[31] Section 165(4) of the Constitution of the Republic of South Africa, 1996; *Modderklip Boerdery (Edms) Bpk v President van die Republiek van Suid-Afrika* 2003 1 All SA 465 (T) para 43.

[32] Mbazira *Strategies for effective implementation* 5.

[33] *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) paras 33-36; Pienaar *Land Reform* 749-765; *Pitje v Shibambo* 2016 4 BCLR 460 (CC); *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 6 SA 294 (SCA); *Mahogany Ridge 2 Property Owners Association v Unlawful Occupiers of Lot 13113 Pinetown* 2013 2 All SA 236 (KZD); *Johannesburg Housing Corporation (Pty) Ltd v The Unlawful Occupiers of the Newtown Urban Village* 2013 1 SA 583 (GSJ). See also in general Liebenberg *Socio-Economic Rights* 268-316, 349-351.

[34] *Hoffmann v South African Airways* 2001 1 SA 1 (CC) para 45; *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) paras 33-38; Kruger (2014) *SALJ* 329.

[35] Sections 4(6)-4(8), 5(1) and 6(3) respectively of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998. See in general *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 33-38. See also Pienaar *Land Reform* 482 where she states that even if all the procedural requirements have been met, a court may still refuse to grant an eviction order on the basis that it is not just and equitable in the circumstances of the case to do so. See for example *Pitje v Shibambo* 2016 4 BCLR 460 (CC); *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 6 SA 294 (SCA); *Mahogany Ridge 2 Property Owners Association v Unlawful Occupiers of Lot 13113 Pinetown* 2013 2 All SA 236 (KZD); *Johannesburg Housing Corporation (Pty) Ltd v The Unlawful Occupiers of the Newtown Urban Village* 2013 1 SA 583 (GSJ). See also in general Liebenberg *Socio-Economic Rights* 268-316, 349-351.

would be appropriate, just and equitable, given the conflicting rights and interests of the land owner; unlawful occupier(s) and the State to grant an eviction order or not.

However, "an appropriate remedy must mean an *effective* remedy".[36] In this regard, "the second challenge is to devise effective remedies where there is an omission to comply with a court-ordered mandate".[37] It is this second challenge postulated by Mbazira which forms the focus of this thesis. The distinction between "appropriate" and "effective" relief and the determination thereof on the basis that it can be viewed as two separate challenges, leaves room for the assumption that the courts' interchangeable use of the phrases may not necessarily be correct. For purposes of this thesis, the courts' determination of appropriate relief accordingly precedes devising effective relief. Appropriate relief is therefore to be regarded as implied in the use of the phrase "effective relief".

Having established the importance that the courts have placed on providing appropriate relief that is also effective, it is necessary to consider what constitutes *effective* relief.[38]

According to Bishop "effective relief" is "relief that leaves no gap between the right and the remedy: It makes the constitutional ideal a reality".[39] The definition of effective relief in eviction cases is accordingly twofold. Firstly, effective relief will be relief that realises the land owner's right to be protected against the arbitrary deprivation of his

[36] *Fose v Minister of Safety and Security* 1997 7 BCLR (CC) para 69; Bishop "Remedies" in *CLOSA* 9-65-9-78; Mbazira *Strategies for effective implementation* 5. See also *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) para 57; *Steenkamp v Provincial Tender Board of the Eastern Cape* 2007 3 BCLR 280 (CC) para 29 where Moseneke DCJ stated: "In each case the remedy must fit the injury. The remedy must be fair [just and equitable in the circumstances] to those affected by it yet *vindicate effectively the right violated*" (my emphasis).
[37] Mbazira *Strategies for effective implementation* 5.
[38] Bishop "Remedies" in *CLOSA* 9-65-9-78. See in general *Fose v Minister of Safety and Security* 1997 7 BCLR (CC) para 69; Mbazira *Strategies for effective implementation* 5.
[39] Bishop "Remedies" in *CLOSA* 9-67.

or her property[40] and the unlawful occupier's right to have access to land[41] and adequate housing[42] and the right not to be arbitrarily evicted from his or her home without a court order.[43] Secondly, effective relief will be relief that demands the State to act in accordance with its mandate to "respect, protect, promote and fulfil the rights"[44] of the land owner and the unlawful occupier respectively.[45] In this regard, courts usually grant eviction orders, where all the procedural and substantive requirements had been met subject to the provision by the State of alternative accommodation to the evictees.[46] The availability of land plays a crucial role in eviction proceedings, especially with regard to the date upon which an eviction order may be executed.[47]

Ideally, an effective remedy in eviction cases would be an *executable* eviction order granted in terms of PIE *provided* that alternative accommodation is *immediately* available.[48] Such a remedy not only realises the respective rights and interests of the

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[40] Section 25(1) of the Constitution of the Republic of South Africa, 1996; *First National Bank of South Africa Ltd t/a Wesbank v Commissioner South African Revenue Service; First National Bank of South Africa Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) which established the test for determining whether a deprivation amounts to a procedurally and/or substantively arbitrary deprivation. See in general Van der Walt *Constitutional Property Law* 190-333 where he comprehensively discusses the definition of an arbitrary deprivation of property. See also Roux "Property" in *CLOSA* 46-17-46-28; J Strydom & S Viljoen (Maass) "Unlawful occupation of inner-city buildings: A constitutional analysis of the rights and obligations involved" (2014) 17 *PELJ* 1207 1220, 1222-1223, 1231-1235; Kruger (2014) *SALJ* 336-341 who also discusses whether an unreasonable delay in the execution of an eviction order amounts to an arbitrary deprivation of property.

[41] Section 25(6) of the Constitution of the Republic of South Africa, 1996. See in general Pienaar *Land Reform* 378-509; Pienaar & Brickhill "Land" in *CLOSA* 48-25-48-52; and Van Wyk (2005) *Stell LR* 466-487.

[42] Section 26(1) of the Constitution of the Republic of South Africa, 1996. See in general *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC); Liebenberg *Socio-Economic Rights* 344-351; Muller *The impact of section 26 of the Constitution* 75-82; McLean "Housing" in *CLOSA* 55-8-55-14.

[43] Section 26(3) of the Constitution of the Republic of South Africa, 1996. See in general Muller *The impact of section 26 of the Constitution* 93-99; Liebenberg *Socio-Economic Rights* 344-347.

[44] Section 7(2) of the Constitution of the Republic of South Africa, 1996; Liebenberg *Socio-Economic Rights* 82-87.

[45] Mbazira *Strategies for effective implementation* 5.

[46] Strydom & Viljoen (Maass) (2014) *PELJ* 1207. See further cases as discussed in Chapter 2 at 4.

[47] K Bezuidenhout *Compensation for excessive but otherwise lawful regulatory state action* LLD Stellenbosch University (2015) 247; AJ van der Walt "The state's duty to protect property owners v the state's duty to provide housing: Thoughts on the *Modderklip* case" (2005) 21 *SAJHR* 144 150.

[48] Section 25(1) and sections 25(6), 26(1) and (3) of the Constitution of the Republic of South Africa, 1996 respectively; Strydom &Viljoen (Maass) (2014) *PELJ* 1207; Swart (2005) *SAJHR* 217. See in general Van der Walt *Constitutional Property Law* 17-18 and Roux "Property" in *CLOSA* 41-1-41-37; Pienaar *Land Reform* 378-509; Pienaar & Brickhill "Land" in *CLOSA* 48-25-48-52; *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC); Liebenberg *Socio-Economic Rights* 344-351; Muller *The impact of section 26 of the Constitution* 75-82 and McLean "Housing" *CLOSA* 55-8-55-14. Furthermore, see *Fose v Minister of Safety and Security* 1997 7 BCLR (CC) para 69; Bishop "Remedies" in *CLOSA* 9-65-9-78; Mbazira *Strategies for effective implementation* 5.

land owner and the unlawful occupier, but also ensures that the rule of law is upheld by requiring the State to adhere to its constitutional obligations. However, while the concept of effective relief may be determined in principle there may be certain inevitable limits on achieving it.[49] In this context courts have accepted that there will be particular cases where "other considerations will justify affording relief that is less perfect [for all the affected parties]".[50]

Firstly, conflicting rights and interests may be of such a nature that the rights in question cannot all be satisfied.[51] On the one hand, section 25(1) of the Constitution protects the land owner against any arbitrary deprivation of property.[52] In this regard, the obtainment of an eviction order in terms of PIE will be in the primary interest of the land owner in order to ensure the private use and enjoyment of his or her property.[53] However, the land owner's rights may be restricted temporarily to allow the State to provide alternative accommodation.[54] In this regard Sachs J in *Port Elizabeth Municipality v Various Occupiers*[55] held that the property rights of land owners should

[49] Bishop "Remedies" in *CLOSA* 9-71.
[50] Bishop "Remedies" in *CLOSA* 9-60-9-61; *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 23; Wilson (2009) *SALJ* 270; Kruger (2014) *SALJ* 328.
[51] Bishop "Remedies" in *CLOSA* 9-71; Strydom & Viljoen (Maass) (2014) *PELJ* 1207, 1211.
[52] *First National Bank of South Africa Ltd t/a Wesbank v Commissioner South African Revenue Service; First National Bank of South Africa Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC); Van der Walt *Constitutional Property Law* 190-333; Roux "Property" in *CLOSA* 46-17-46-28; Muller *The impact of section 26 of the Constitution* 72. See in general Wilson (2009) *SALJ* 270-290; Pienaar & Mostert (2006) *TSAR* 522-536.
[53] Muller *The impact of section 26 of the Constitution* 17 and 22; Liebenberg *Socio-Economic Rights* 266-316, 349-351. The approach to evictions and the remedies available for eviction in the pre- and post-constitutional era differ dramatically. See CT Cloete *A critical analysis of the approach of the court in the application of eviction remedies in the pre- and post-constitutional context* LLM Stellenbosch University (2016 forthcoming) 4 2 1 3 where she explains that there has been a shift in the conceptual understanding of ownership. Ownership under the Constitution is no longer regarded as absolutely exclusive, but rather accepted to be inherently limitable. See CG van der Merwe "Things" in WA Joubert & JA Faris (eds) *LAWSA* 2 ed (RS 1 2014) para 151; P Dhliwayo *A constitutional analysis of access rights that limit landowners' right to exclude* LLD Stellenbosch University (2015) 102; P Dhliwayo & AJ van der Walt "The notion of absolute and exclusive ownership" *SALJ* (2016 forthcoming) 19 in this regard. Furthermore, the promulgation of PIE, which gives effect to section 26(3) of the Constitution replaced the common law *rei vindicatio* as well as the Prevention of Illegal Squatting Amendment Act 92 of 1976 ("PISA"). In this regard Muller *The impact of section 26 of the Constitution* 17 notes that the promulgation of PIE marked a shift in the focus of eviction legislation from the prevention of illegal squatting under PISA during apartheid to the prevention of illegal eviction in the post-constitutional era. Accordingly, land owners have to employ PIE to evict unlawful occupiers from land. See *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 39; *Pitje v Shibambo* 2016 BCLR 460 (CC); H Mostert & A Pope (eds) PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 247; Liebenberg *Socio-Economic Rights* 271; Pienaar *Land reform* 688 in this regard. Notably, even where a land owner follows the procedures set out in PIE to evict unlawful occupiers, the eviction application does not guarantee that he or she will succeed with the application.
[54] *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 6 SA 417 (SCA) para 30; Strydom &Viljoen (Maass) (2014) *PELJ* 1211.
[55] 2005 1 SA 217 (CC).

be understood against the social and historical background of forced evictions and the consequent need for the establishment of secure property rights for those who were either denied access to land or who were deprived of such rights during apartheid.[56] Over time and in some instances, a temporary restriction on the rights of the land owner may amount to an indefinite deprivation of rights, which may be regarded as an arbitrary deprivation of property.[57]

On the other hand, the Constitution affords everyone, including unlawful occupiers, a right to access to adequate housing.[58] Realising the right to access to housing is intrinsically linked to the provision of access to land,[59] legally secure tenure[60] and the right to be protected against arbitrary evictions.[61] In this regard Pienaar states:

> "[T]he application of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998…may, depending on the particular facts and circumstances of the case, result in access to land. That may be the case where the granting of an eviction order is prevented on the basis that it is not just and equitable or *where the order was granted but cannot be executed*, for various reasons. In these particular instances the impact of PIE would thus be that (unlawful) occupiers would have effectively gained access to land (and housing), albeit usually for an *interim* period only" (my emphasis).[62]

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[56] *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 15. See Muller *The impact of section 26 of the Constitution* 33-53 for and overview of the urban and land tenure measures that deprived people of their land during apartheid.

[57] Strydom & Viljoen (Maass) (2014) *PELJ* 1207, 1211 1220, 1222-1223, 1231-1235; *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue* 2009 1 SA 470 (W) paras 34, 35 and 39-40; Bezuidenhout *Compensation for excessive state action* 249-250. See *First National Bank of South Africa Ltd t/a Wesbank v Commissioner SSouth African Revenue Service; First National Bank of South Africa Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC); Van der Walt *Constitutional Property Law* 190-333. See also Roux "Property" in *CLOSA* 46-17-46-28; Kruger (2014) *SALJ* 336-341 who also discusses whether an unreasonable delay in the execution of an eviction order amounts to an arbitrary deprivation of property.

[58] Section 26(1) of the Constitution of the Republic of South Africa, 1996. See in general *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC); Liebenberg *Socio-Economic Rights* 344-351; Muller *The impact of section 26 of the Constitution* 75-82; McLean "Housing" in *CLOSA* 55-8-55-14. See furthermore Wilson (2009) *SALJ* 270-290; Pienaar & Mostert (2006) *TSAR* 522-536.

[59] Section 25(5) of the Constitution of the Republic of South Africa, 1996; JM Pienaar "Land reform and housing: Reaching for the rafters or struggling with foundations?" (2015) 30 *SAPL* 1 8. See furthermore Van Wyk (2005) *Stell LR* 466-487.

[60] Section 25(6) of the Constitution of the Republic of South Africa, 1996. See in general Pienaar *Land Reform* 378-509 and Pienaar & J Brickhill "Land" in *CLOSA* 48-25-48-52.

[61] Section 26(3) of the Constitution of the Republic of South Africa, 1996 read with sections 4(6) and 6(1) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998. See in general Muller *The impact of section 26 of the Constitution* 93-99; Liebenberg *Socio-Economic Rights* 344-347.

[62] Pienaar (2015) *SAPL* 20.

However, providing access to land and adequate housing on an interim basis does not effectively realise the rights of the unlawful occupiers, because it does not provide them with permanent land and adequate housing and legally secure tenure.[63] Although courts are often unable to provide unlawful occupiers with lawful and secure land and housing rights[64] there is a duty on the State to address insecure tenure progressively.[65] It follows that the primary interest of the unlawful occupier in cases where an eviction order is granted, is the acquisition of alternative land and accommodation on a permanent basis, which will ultimately result in legally secure tenure. However, section 26 does not entitle any person the right to housing automatically and immediately.[66] Instead, section 26 provides for a right to *access* to housing.[67]

Realising the primary interests of the land owner and the unlawful occupiers will inevitably necessitate State involvement.[68] In this regard, the State has an obligation to "respect, protect, promote and fulfil the rights"[69] entrenched in the Bill of rights. The State, within its available resources, must ensure that the rights of the land owner and

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[63] Viljoen (2015) *SAPL* 47, 64; Van Wyk (2005) *Stell LR* 466-487.

[64] Strydom & Viljoen (Maass) (2014) *PELJ* 1211. Section 26(1) of the Constitution of the Republic of South Africa, 1996. See in general *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC); Liebenberg *Socio-Economic Rights* 344-351; Muller *The impact of section 26 of the Constitution* 75-82; McLean "Housing" *CLOSA* 55-8-55-14.

[65] Viljoen (2015) *SAPL* 47.

[66] Section 26(2) of the Constitution of the Republic of South Africa provides that "The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right". Access to housing does not imply that housing is available immediately. Instead it means that the State has to progressively realise the right over a period of time within its available resources, as envisaged in section 26(2) of the Constitution of the Republic of South Africa, 1996. See Liebenberg *Socio-Economic Rights* 187-206 specifically and Muller *The impact of section 26 of the Constitution* 82-93 in this regard. See *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) paras 39-46 where the court analyses section 26(2). See further Pienaar (2015) *SAPL* 8; *City of Johannesburg v Changing Tides (Pty) Ltd* 2012 6 SA 294 (SCA) para 15; Strydom & Viljoen (Maass) (2014) *PELJ* 1214.

[67] *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) paras 27-28 and 35-46 where the court distinguishes the right of *access to adequate housing* in the Constitution in relation to the *right to adequate housing* as envisaged in the International Covenant on Economic, Social and Cultural Rights ("Covenant"). The court stated that: "The right delineated in section 26(1) is a right of "access to adequate housing" as distinct from the right to adequate housing encapsulated in the Covenant. This difference is significant. It recognises that housing entails more than bricks and mortar. It requires available land, appropriate services such as the provision of water and the removal of sewage and the financing of all of these, including the building of the house itself. For a person to have access to adequate housing all of these conditions need to be met: there must be land, there must be services, there must be a dwelling. Access to land for the purpose of housing is therefore included in the right of access to adequate housing in section 26". See Liebenberg *Socio-Economic Rights* 187-206 specifically in this regard. See also McLean "Housing" *CLOSA* 55-31-55-39.

[68] Viljoen (2015) *SAPL* 44.

[69] Section 7(2) of the Constitution of the Republic of South Africa, 1996; Viljoen (2015) *SAPL* 44-46.

the unlawful occupier are protected and fulfilled through the progressive realisation of the right to adequate housing.[70] The realisation of this right requires the State to enact reasonable legislation and other measures to ensure the progressive realisation of housing rights.[71] The implementation of the legislation and other measures enacted to progressively realise the right to housing may necessitate a reasonable degree of patience from the land owner.[72] In other words, although the landowner cannot be expected to be burdened with providing accommodation to the unlawful occupiers indefinitely, landowners must have a reasonable degree of patience pending the execution of an eviction order.[73] If alternative accommodation is readily available, then the need to occupy the owner's land unlawfully will diminish. The rights of the land owner and unlawful occupier mentioned above will be protected and fulfilled in accordance with the State's obligation to do so. It is therefore also in the interest of the State to realise its obligation to protect and fulfil the rights of land owners and the unlawful occupiers.

Secondly, it may be practically impossible for an effective remedy to be executed.[74] In *Modderklip Boerdery (Pty) Ltd v Modder East Squatters* ("Modderklip HC"),[75] where the applicant's farm had been invaded by people seeking land and the police were unable to evict them, the Supreme Court of Appeal[76] and the Constitutional Court[77] opted for constitutional damages as an effective remedy in the circumstances, considering the practical difficulty of enforcing the eviction order. However, problems

[70] Section 26(2) of the Constitution of the Republic of South Africa, 1996. For a comprehensive analysis of the housing rights of unlawful occupiers in the post-1994 constitutional dispensation see Muller *The impact of section 26 of the Constitution* 82-93. Furthermore, see in general *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC); Liebenberg *Socio-Economic Rights* 344-351; McLean "Housing" in *CLOSA* 55-8-55-14 in general.
[71] Pienaar (2015) *SAPL* 8-9; Viljoen (2015) *SAPL* 44; Strydom & Viljoen (Maass) (2014) *PELJ* 1216-1218. See for example the Housing Act 107 of 1997 which provides that the State must establish and facilitate the housing development process. Other legislative measures to provide for the realisation of the right of access to adequate housing include: the Rental Housing Act 50 of 1999; the Home Loan and Mortgage Disclosure Act 63 of 2000 and the Housing Consumer Protection Measures Act 95 of 1998.
[72] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 2 SA 104 (CC) para 100.
[73] *Blue Moonlight Properties 39 (Pty) Ltd v the Occupiers of Saratoga Avenue* 2009 1 SA 470 (W) paras 34, 35, 39-40 and 97; Strydom & Viljoen (Maass) (2014) *PELJ* 1222; Kruger (2014) *SALJ* 329.
[74] Bishop "Remedies" in *CLOSA* 9-72.
[75] 2001 4 SA 385 (W). See in general A Christmas "The Modderklip cases: evictions and the right of access to adequate housing: case review" (2003) 6 *ESR Review* 4-7.
[76] *Modder East Squatters v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa v Modderklip Boerdery* 2004 3 All SA 169 (SCA); Van der Walt (2005) *SAJHR* 144 150.
[77] *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC).

with execution will not always be as extreme as in the *Modderklip HC* case. More often, problems with execution - regardless of the reason(s) behind it - may obstruct *immediate* effective relief only. In this regard, some commentators are of the opinion that the problems associated with the execution of an eviction order will necessarily prevent effective relief, because it obstructs *immediate* effective relief.[78] However, for purposes of this thesis it is argued that effective relief will in principle constitute appropriate relief for all the affected parties that can be executed within a *reasonable* time.[79] As there is no precise or definite definition of what constitutes a reasonable time in South African law, it is arguably best to be determined in light of the particular circumstances of each case.[80] In this context the proceedings as a whole must be considered. Different or individual delays may not in itself give rise to an unreasonable delay in providing effective relief. However, different delays, when viewed together and cumulatively, may result in a reasonable time being exceeded. Accordingly, a delay during a particular phase of the eviction process may be permissible, provided that the total duration of the eviction process as a whole, does not amount to an unreasonable delay.[81] The reasonableness of the length of the eviction process may be assessed in light of the following criteria: (a) the complexity of the case;[82] (b) the conduct of the land owner in instituting eviction proceedings to protect his or her

[78] Swart (2005) *SAJHR* 217 where the author argues that "the emphasis in developing new effective remedies must be on immediacy. An effective remedy will be a remedy which is capable of immediate implementation". See also Bishop "Remedies" in *CLOSA* 9-65-9-78.
[79] G Budlender "Access to Courts" (2004) 121 *SALJ* 339 354; Bishop "Remedies" in *CLOSA* 9-60-9-78 where the author acknowledges that *immediate* relief will constitute the ideal. However, he argues that *immediate* effective relief is not necessarily attainable and "other considerations will justify affording relief that is less than perfect"; *Hoffmann v South African Airways* 2001 1 SA 1 (CC) para 45; *Fose v Minister of Safety and Security* 1997 7 BCLR (CC) para 69; Mbazira *Strategies for effective implementation* 5.
[80] See the Council of Europe/European Court of Human Rights "Guide on Article 6: The right to a fair trial" (2013) 51-52 <http://www.echr.coe.int> (accessed 30-05-2016).
[81] Council of Europe/European Court of Human Rights "Guide on Article 6: The right to a fair trial" (2013) 51-52.
[82] Council of Europe/European Court of Human Rights "Guide on Article 6: The right to a fair trial" (2013) 52.

property rights;[83] (c) the conduct of the relevant State officials and departments;[84] and (d) the consequences of an excessive delay in the proceedings as a whole.[85]

In this regard, a reasonable time can be regarded as the extent of time which is necessary, to do whatever is required to be done, as soon as circumstances permit. The circumstances pertaining to the execution of eviction orders usually require the State to provide access to land and adequate housing to unlawful occupiers facing eviction.[86] The realisation of these rights will accordingly end the unlawful occupation of land and/or property and will effectively result in the realisation of the land owner's right not to be arbitrarily deprived of his property. However, this does not impose an absolute or unqualified obligation on the State to provide adequate housing immediately, but rather, as soon as practically possible within its available resources.[87] Although the meaning of a reasonable time may be vague and lead to uncertainty, the time period affixed to the execution of an eviction order should be flexible. This is imperative, given changing circumstances, such as the complexity of the case, the conduct of the parties, budget restraints and competency issues on the part of the State. Accordingly, what constitutes a "reasonable time" in the context of evictions may be regarded as case-specific, in consideration of the particular circumstances of each eviction case. Therefore, an eviction order that cannot be executed within a reasonable time does not constitute effective relief.

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[83] *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) paras 28-29 where it was held that land owners bear the primary responsibility to take reasonable steps to protect their property. Accordingly, where a land owner's conduct amounts to a negligent or unreasonable delay, a court may be inclined to refuse to grant an eviction order or alternative remedy. See also *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 1 SA 530 (CC) in this regard. Council of Europe/European Court of Human Rights "Guide on Article 6: The right to a fair trial" (2013) 52-53.

[84] Council of Europe/European Court of Human Rights "Guide on Article 6: The right to a fair trial" (2013) 53.

[85] Council of Europe/European Court of Human Rights "Guide on Article 6: The right to a fair trial" (2013) 54-55.

[86] Section 26(1) read with section 26(2) of the Constitution of the Republic of South Africa, 1996. See in general *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC); Liebenberg *Socio-Economic Rights* 344-351; Muller *The impact of section 26 of the Constitution* 75-93; McLean "Housing" *CLOSA* 55-8-55-14.

[87] *Government of the Republic of South Africa v Grootboom* 2001 1 SA 86 (CC) para 38. For a comprehensive analysis of how the Constitutional Court described this positive obligation and the academic debate around it see Muller *The impact of section 26 of the Constitution* 84-92. See also McLean "Housing" in *CLOSA* 55-8-55-14 and Liebenberg *Socio-Economic Rights* 187-206.

Eviction orders that are not executable within a reasonable time, whether due to the State's inattentiveness, incompetence or intransigence[88] to act in accordance with its constitutional obligations, have increasingly become contentious.[89] Depending on the circumstances, an eviction order may not be effective given the State's attitude towards executing it. This may result in the courts having to "develop appropriate remedies [where] existing conventional remedies fall short of providing effective relief".[90] Effective relief is therefore needed to uphold the *ubi jus, ibi remedium* principle and to ensure that the rights and interests of all affected parties are realised through State compliance with its constitutional mandate "to respect, protect, promote and fulfil the rights," entrenched in the Constitution.[91]

It is presumed that the following remedies may constitute effective relief for affected parties to an eviction case where there is an omission to execute an eviction order granted in terms of PIE: a structural interdict, constitutional damages and contempt of court orders.

3 Objective of the study

In light of the above, the objective of this study is twofold. Firstly, the research sets out to establish *what* constitutes effective relief regarding residential property,[92] following a failure to execute an eviction order granted in terms of PIE. In this regard, effective relief, in the context of evictions pertaining to residential property, constitutes appropriate relief for all affected parties that can be executed within a *reasonable* time.[93] Secondly, the aim is to analyse whether or to what extent a structural interdict;

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[88] K Roach & G Budlender "Mandatory relief and supervisory jurisdiction: when is it appropriate, just and equitable?" (2005) 122 *SALJ* 325 346-351.
[89] Mbazira *Strategies for effective implementation* vi.
[90] Section 38 read with section 172(1)(b) of the Constitution of the Republic of South Africa, 1996; Swart (2005) *SAJHR* 217; *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) paras 18 and 33. See also Bishop "Remedies" in *CLOSA* 9-65-9-78; Mbazira *Strategies for effective implementation* 5; Liebenberg *Socio-Economic Rights* 377-461; *Fose v Minister of Safety* 1997 7 BCLR (CC) para 69 where the Court stated that that it could "forge new tools and shape innovative remedies" in order to vindicate a proven violation of a person's right.
[91] Section 7(2) of the Constitution of the Republic of South Africa, 1996; Liebenberg *Socio-Economic Rights* 82-87.
[92] The scope of this investigation is restricted to residential rural and urban property. Consequently, the effective relief regarding the execution of an eviction order in respect of *commercial* property is excluded from the scope of this research.
[93] Budlender (2004) *SALJ* 354; Bishop "Remedies" in *CLOSA* 9-60-9-61 and 9-65 where the author acknowledges that *immediate* relief will constitute the ideal effective relief. However, he argues that *immediate* effective relief is not necessarily attainable and "other considerations will justify affording

constitutional damages and/or a contempt of court order will be regarded as effective relief, both from the perspective of the land owner and the unlawful occupier(s), given the conflicting rights and interests of the respective parties. It may also be important to consider the role and involvement of the State as a facilitator and/or as an owner in the process of eviction in order to determine what would be regarded as effective relief from that perspective. The impact of the respective remedies on the abovementioned parties will be analysed in order to determine if the relief granted can be regarded as "effective relief" relating to residential property, following a failure to execute an eviction order.

4 Research questions

The research questions for the study are accordingly twofold:

- What constitutes effective relief regarding residential property, following a failure to execute an eviction order, taking into account the conflicting rights and interests of the land owner, the unlawful occupier(s) and the State?
- Whether or to what extent a structural interdict; constitutional damages or contempt of court orders will be regarded effective relief from the perspective of the land owner; the unlawful occupier(s) and the State?

5 Methodology

The nature of this study requires a literature-based analysis of primary and secondary sources: the former comprising the use (analysis and/or discussion) of relevant case law and legislation and the latter comprising a discussion of relevant domestic and foreign textbooks and journal articles. Case law and legislation will primarily be used in order to establish the relevant circumstances under which the courts have granted structural interdicts, constitutional damages and contempt of court orders as comprising effective relief. It will also enable one to determine to what extent these forms of relief can be regarded as effective from the respective perspectives of the land owner, unlawful occupier(s) and the State. It is therefore crucial to analyse these

relief that is less than perfect"; *Hoffmann v South African Airways* 2001 1 SA 1 (CC) para 45. See also Swart (2005) *SAJHR* 217; Mbazira *Strategies for effective implementation* 5.

sources in order to posit a role for the courts in realising effective relief for all parties involved through "forging new tools and shaping innovative remedies".[94] Arguably, the use of the structural interdict, constitutional damages and contempt of court orders may provide effective relief for all parties and society as a whole if the court is willing to embrace the concept of affirmative judicial action and the State is willing to provide the necessary mechanism(s) to execute court orders within a reasonable time.

For purposes of this thesis, comparative examples from foreign jurisdictions, namely Germany, Canada and the United States will be referred to, where relevant.[95] Importantly, the use of such comparative examples does not constitute an in-depth analysis or all-encompassing legal comparative study. Instead, the insights drawn from these examples will only play a supporting role, regarding the method for executing eviction orders, to the extent that it may be accommodated within the South African remedial processes. Accordingly, the investigation does not constitute an in-depth legal comparative study *per se*.

6 Qualifications of the study

Although various phases, such as the procedural and adjudicatory phases, are relevant in eviction cases, the focus of this thesis is only on the phase that emerges after an eviction order was granted, but not executed. The scope and focus of the research are accordingly restricted to effective relief regarding residential property following a failure to execute an eviction order and not whether it was appropriate in the circumstances to grant an eviction order in the first place.[96] The research is limited to the *execution* of eviction orders and does not deal with substantial and procedural requirements[97] regarding eviction applications *per se*. Furthermore, underlying reasons as to why eviction orders were not executed will not be analysed in detail either. Instead, reasons are alluded to insofar as they are linked to effective relief only.

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[94] *Fose v Minister of Safety* 1997 7 BCLR (CC) para 69.
[95] Section 39(1)(c) of the Constitution of the Republic of South Africa, 1996 which provides that a court may consider foreign law when interpreting the Bill of Rights.
[96] Sections 4(6)-4(8), 5(1) and 6(3) respectively of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998; *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) paras 33-36; Pienaar *Land Reform* 749-765; van Wyk (2011) *PELJ* 55-57.
[97] Pienaar *Land Reform* 720-723, 734, 749-765; Muller *The impact of section 26 of the Constitution* 114-115; Van der Walt & Pienaar *Introduction to the Law of Property* (2016) 373-374; Van Wyk (2011) *PELJ* 55-57.

While the study is not focused on analysing the reasons for non-execution as such, these reasons may become relevant insofar as they relate to the effective relief dimension. For example, incapacity of local authorities may be relevant as it explains the reason for the failure to execute an eviction order. The underlying reasons for incapacity however, fall outside the scope of this study.

Importantly, the scope of this investigation is also restricted to residential rural and urban property, essentially where PIE is applicable.[98] Consequently, the effective relief regarding the execution of an eviction order in respect of *commercial* and *business* properties is excluded from the scope of this research.[99]

Although cognisance has been taken of other remedies such as the *mandament van spolie*[100] and administrative remedies found in the Promotion of Administrative Justice Act 3 of 2000,[101] the scope of this thesis is restricted to the following remedies within

[98] Section 26(1) read with section 26(3) of the Constitution of the Republic of South Africa, 1996 and section 1(i) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("PIE"). Pienaar *Land Reform* 701- 702 explains that a court order is necessary where housing, shelter and residential issues are involved. Accordingly, PIE applies "to all instances where a home, dwelling or abode is occupied unlawfully, generally impacting on housing and residential concerns, in relation to both vacant land and built environments. While permanency of occupation is not required, it is necessary that the home or dwelling in question is where persons habitually reside.

[99] *Ndlovo v Ngcobo and Bekker v Jika* 2003 1 SA 113 (SCA) para 20 where it was held that the Prevention of Illegal Eviction from Unlawful Occupation of Land Act 19 of 1998 does not apply to the eviction of juristic persons and persons that do not use buildings and structures as "a form of dwelling or shelter". See also MR Chetty "The applicability of the Prevention of Illegal Eviction Act: cases" (2002) 3 *ESR Review* 14-17 and *MC Denneboom Service Station CC v Phayane* 2015 1 SA 54 (CC) para 17.

[100] ZT Boggenpoel & JM Pienaar "The continued relevance of the *mandament van spolie*: recent developments relating to dispossession and eviction" (2013) 46 *De Jure* 998; ZT Boggenpoel "Does method really matter? Reconsidering the role of common law remedies in the eviction paradigm" (2014) 7 *Stell LR* 72.

[101] Viljoen (2015) *SAPL* 54-58 where she holds that "Decisions taken by organs of state that relate to section 26(1) and (2) of the Constitution are often of an administrative nature since it impacts households' rights and expectations negatively. The state's failure to act also qualifies as an administrative action in terms of s 1 of the Promotion of Administrative Justice Act 2 of 2000 ("PAJA"). In this regard, section 8 PAJA lists a number of available administrative remedies. Whether administrative remedies will be available will depend on whether there has been a failure to implement an administrative decision (as defined in section 1 of PAJA. Although administrative remedies do not form part of the scope of this thesis, it can be argued that a decision taken by the State to evict a person, or a group of people, could be regarded as administrative action because the decision may have a direct external and prejudicial effect on the unlawful occupiers' right enshrined in section 26(1). Failure by the State to adhere to the obligation to provide access to land and adequate housing enshrined in terms of section 25(5) and section 26(2) of the Constitution respectively, could also be regarded as an administrative action. In this regard, the State's failure to act qualifies as an administrative action in terms of section 1 of PAJA.

the eviction context: the structural interdict, [102] constitutional damages[103] and civil contempt of court orders.[104]

7 Structure of the study

7 1 Introduction

Having established what can be regarded as effective relief,[105] the following chapters seek to establish whether the structural interdict, constitutional damages and/or contempt of court orders can provide effective relief to affected parties where there has been a failure to execute an eviction order.

7 2 Chapter 2: The structural interdict

Chapter 2 discusses the structural interdict as a remedy to vindicate a failure to execute an eviction order pertaining to residential property. The chapter seeks to provide an exposition of the general requirements for a structural interdict. A discussion of the structural interdict's nature, scope, purpose and features follows the discussion of the general requirements. Thereafter arguments against and in favour of the structural interdict are explored. It is proposed that the criticism pertaining to the use of the structural interdict can be addressed by formulating the structural interdict in such a way that it does not conflict with the separation of power doctrine. Alternatively, different models for supervision may be employed to address the critique against the use of the structural interdict.

In this regard, the models for oversight developed and found in American jurisprudence have provided some insight. To reiterate, the examples and insights drawn from foreign law in this regard do not constitute an all-encompassing comparative analysis. American jurisprudence is used because the origin of the

[102] With or without meaningful engagement. See also Muller *The impact of section 26 of the Constitution* in general and S Liebenberg "Engaging the paradoxes of the universal and particular in human rights adjudication: The possibilities and pitfalls of meaningful engagement" (2012) 12 *AHRLJ* 1-30 for an in depth analysis of the use of "meaningful engagement'' as an important remedial response in the context of the execution of eviction orders. See Chapter 2 for a comprehensive discussion and analysis of the structural interdict.
[103] See Chapter 3 for a discussion and analysis of indirect and direct constitutional damages.
[104] See Chapter 4 for a discussion and analysis of civil contempt of court orders.
[105] See 2 2 above.

structural remedy as a constitutional remedy can be traced back to the United States school desegregation cases.[106] Since the use of the structural interdict in school desegregation cases in the United States, the remedy has been utilised to also promote constitutional reform in other contexts.[107] To the extent that it may be accommodated within the South African remedial processes, the bargaining, public hearing, expert remedial formulation, report back to court and consensual remedial formulation models provide different processes and methods for oversight, which are key to the structural interdicts' anatomy. It is clear that the formulation of the structural interdict and model used for oversight must be structured and used in such a way so that it suits the very specific circumstances of each case. Changing circumstances, often present in eviction cases, may also justify and require the use of a different model for oversight for obtaining effective relief. In this regard, there is room for the South African courts to explore other models for oversight, apart from the report back to court model, which may provide different ways in achieving different outcomes to eviction cases.

A discussion of the various possible models for oversight is followed by a discussion of the circumstances under which it would be appropriate to use the structural interdict. Ultimately, various factors are identified and discussed in relation to the use of the structural interdict in South African eviction case law. The discussion of the case law considers whether the use of the structural interdict was appropriate in accordance with the factors identified by the courts and academic writers and whether it provided effective relief to the relevant parties. It will become apparent from the selected cases

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[106] *Brown v Board of Education of Topeka* 347 US 483 (1954) (*Brown 1*) and *Brown v Board of Education of Topeka* 349 US 294 (1955) (*Brown 2*); C Mbazira "From ambivalence to certainty: Norms and principles for the structural interdict in socio-economic rights litigation in South Africa" (2008) 24 *SAJHR* 1 4 states these cases were "propelled by the need to realise transformation of the dual school system based on race, into a unitary and non-racial school system. It required a great deal of organisational reform to transform the entrenched racial segregation, which had survived for hundreds of years. The courts were required to transform this entrenched *status quo* and to reconstruct the social reality in a radical manner. What was required included establishing new procedures for student assignments, new criteria for construction of schools, revision of transport routes, re-assignment of facilities, curricular modifications, reallocation of resources, and above all, establishing equity in the school system. The question is whether all these objectives would have been achieved through the conventional one-stance traditional litigation and remedial procedures. The answer is a definite no; it required protracted and unusual methods of litigation and remediation; hence the resort to the structural interdict to ensure that the obstinate school and local authorities implemented the desired reforms"; N Swanepoel "Die aanwending van die gestruktureerde interdik in die Suid-Afrikaanse konstitutionele regsbedeling: 'n eiesoortige beregtingsproses" (2015) 12 *Litnet Akademies* 374 379.

[107] Swanepoel (2015) *Litnet* 379. See also D Zaring "National rulemaking through trial courts" (2004) 51 *UCLA LR* 1015-1077.

that the structural interdict may not be the most effective remedy in all cases where there has been a failure to execute an eviction order.[108] Alternative effective relief, such as constitutional damages, may prove to be more effective, given the circumstances of the case.[109] The structural interdict may also not be the most appropriate or effective remedy where the affected parties have a different idea of what will provide effective relief to them.[110] In this regard, the structural interdict should be used as a means to achieve a negotiated solution. The parties should be given the chance to engage with each other meaningfully on what they believe to be the most appropriate and effective way of achieving relief. However, a too detailed structural interdict with specific instructions, standards and terms may render the use thereof ineffective. In this regard, the courts should have a clear idea of what the parties want. A structural interdict may also not be effective simply due to reluctance or a failure on the part of State officials to observe the rule of law and respect and execute eviction orders timeously.[111] Further relief, such as contempt of court proceedings, may be used in this context to ensure that State officials adhere to their constitutional obligations. By way of contrast, *Olivia Road v City of Johannesburg* ("Olivia Road"),[112] illustrates that the use of a structural interdict, coupled with an order to engage meaningfully *before* an eviction order is granted, may prove to provide effective relief

[108] *Modderklip Boerdery (Edms) Bpk v President van die Republiek van Suid-Afrika* 2003 1 All SA 465 (T) and *Residents of Joe Slovo Community, Western Cape v Thubelisa Homes* 2010 3 SA 454 (CC).
[109] See Chapter 2 at 4 2 where *Modderklip Boerdery (Edms) Bpk v President van die Republiek van Suid-Afrika* 2003 1 All SA 465 (T) and *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) are discussed with regard to the appropriateness and effectiveness of constitutional damages as an alternative effective remedy to the structural interdict.
[110] *Residents of Joe Slovo Community, Western Cape v Thubelisa Homes* 2011 7 BCLR (CC). See in general L Chenwi "Upgrading of informal settlements and the rights of the poor: the case of Joe Slovo: case review" (2008) 9 *ESR Review* 13-18; L Chenwi & K Tissington "'Sacrificial Lambs' in the quest to eradicate informal settlements. The plight of the Joe Slovo residents: case review" (2009) 10 *ESR Review* 18-24; K McLean "Meaningful engagement: one step forward or two back? Some thoughts on Joe Slovo" (2010) 3 *CCR* 223-242.
[111] *Pheko v Ekurhuleni Metropolitan Municipality* 2012 2 SA 598 (CC); Mbazira *Strategies for effective implementation* vi.
[112] 2008 3 SA 208 (CC). See in general B Ray "*Occupiers of 51 Olivia Road v City of Johannesburg*: Enforcing the right to adequate housing through 'engagement'" (2008) 8 *HRLR* 703-713; L Chenwi & S Liebenberg "The constitutional protection of those facing eviction from "bad buildings": case review" (2008) 9 *ESR Review* 12-17; L Chenwi "A new approach to remedies in socio-economic rights adjudication: *Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others*" (2009) 2 *CCR* 371-393; L Chenwi "'Meaningful engagement' in the realization of socio-economic rights: the South African experience" (2011) 26 *SAPL* 128-156; G Muller "Conceptualising "meaningful engagement" as a deliberative democratic partnership" (2011) 22 *Stell LR* 742-758; Liebenberg (2012) 12 *AHRLJ* 1-29.

to the affected parties.[113] What is evident, and what was seemingly lacking from the other cases, was a willingness to participate and reach a negotiated solution.

7 3 Chapter 3: Constitutional damages

Following an illustration and discussion of the ineffective use of the structural interdict in South African eviction case law in Chapter 2, Chapter 3 explores the use of indirect and direct constitutional damages as a form of alternative effective relief where there has been a failure to execute an eviction order or a failure to adhere to a structural interdict.[114] Where relevant, Chapter 3 encompasses a legal comparative explanation, as opposed to a fully-fledged legal comparative study, in relation to the following three aspects: (a) *Ausgleich*[115] (also known as equalisation measures) in German law; (b) Charter damages in Canadian Law;[116] and (c) Sharing in American Property Law.[117]

A discussion of indirect constitutional damages precedes a discussion of direct constitutional damages. This is in line with the single-system of law principle and subsidiarity principles:[118] Only where there is no legislation that provides for monetary compensation or where the common law does not provide effective relief may reliance

[113] Strictly speaking, this case falls outside the focus of this thesis, because the court in *Olivia Road* never granted an eviction order. Although the court did not grant an eviction order, eviction proceedings where instituted nevertheless. Arguably, an eviction order would have been inevitable had the court not issued a structural interdict - or an *interim* structural interdict to be more specific. While the case may not fall within the scope of this thesis, the remedy does. Ultimately, this thesis explores whether the remedies discussed may provide effective relief to those involved in the eviction process. It may be helpful and insightful to identify the elements of the structural interdict in *Olivia Road* which led to the realisation of the parties' rights. For these reasons, the case is accordingly discussed. See Chapter 2 at 4 5.

[114] *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC). See in general A Christmas "The *Modderklip* case: the state's obligations in evictions instituted by private landowners: case review" (2005) 4 *ESR Review* 6-10; S Khoza "Questioning the wisdom of moving 40 000 people: the Modderklip saga continues: case review" (2005) 6 *ESR Review* 10-11; Van der Walt (2005) *SAJHR* 144-161.

[115] Van der Walt *Constitutional Property Law* 3 366-367 and 277-280; J Strydom *A hundred years of demolition orders: A constitutional analysis* LLD Stellenbosch University (2012) 350.

[116] *Vancouver (City) v Ward* 2010 2 SCR 28 SCC. This case has provided Canada with an authoritative interpretation of "appropriate and just relief" in section 24(1) of the Charter in respect of constitutional damages. See in general S Barns "Constitutional damages: A call for the development of a framework in South Africa" (2013) *Responsa Meridiana* 17; C Okpaluba "The development of Charter Damages Jurisprudence in Canada: Guidelines from the Supreme Court" (2012) 55 *Stell LR* 55-75 55-56; and CDL Hunt "Case Note: Constitutional Damages in the Supreme Court of Canada" (2011) 115 *Cambridge Student LR* 115-120 115.

[117] R Dyal-Chand "Sharing the Cathedral" (2013) 46 *Connecticut LR* 647-723 647.

[118] *Ex Parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa* 2000 2 SA 674 (CC) para 44; AJ van der Walt *Property and Constitution* (2012) 19-20; AJ van der Walt "Normative pluralism and anarchy: Reflections on the 2007 term" (2008) 1 *CCR* 77.

be placed on direct constitutional damages.[119] In the context of evictions, PIE does not provide for a compensatory remedy nor does the law of delict provide for an effective remedy.[120] PIE does not intend to *permanently* deprive a land owner of ownership or enjoyment of property.[121] However, in some instances the application of PIE results in individual property owners having to bear disproportionate harsh and excessive burdens for the sake of some public purpose.[122] However, it may be inappropriate to invalidate PIE, but also unfair to expect of private land owners to bear the harsh and disproportionate burden that results from a regulatory measure, such as PIE, in the public interest, without compensation. PIE is currently formulated in such a way that it does not provide for compensation in cases where the unlawful occupation of land amounts to an indefinite deprivation of a land owner's land or property. In this regard, German law provides alternative approaches to declaring an excessive regulatory provision invalid.[123] *Ausgleich,* the payment of compensation, may provide an alternative to invalidation.[124] Consequently, it is argued and recommended in Chapter 5, which sets out the final recommendations and conclusions, that PIE should be amended to include what is known in German law as an equalisation measure.[125] This German concept only serves as an example of how PIE can be amended and does not constitute an in-depth comparative analysis of equalisation measures in Germany and South Africa.

In the absence of a regulatory framework providing for compensation and in instances where PIE or the law of delict cannot be interpreted or developed to be in line with the Constitution,[126] it becomes necessary for the court to step in and award direct

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[119] Van der Walt *Property and Constitution* 36, 40-43, 81-91.
[120] Bezuidenhout *Compensation for excessive state action* 246-280.
[121] *Grobler v Msimang* 2008 3 All SA 549 (W) para 132.
[122] Bezuidenhout *Compensation for excessive state action* 129; *Blue Moonlight Properties 39 (Pty) Ltd v The Occupiers of Saratoga Avenue* 2009 1 SA 470 (W) paras 34, 35, 39-40 and 97; *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39* 2012 2 SA 104 (CC) para 100. Van der Walt (2005) 21 *SAJHR* 150.
[123] Bezuidenhout *Compensation for excessive state action* 204.
[124] Bezuidenhout *Compensation for excessive State action* 204. Equalisation measures are similar to direct constitutional damages in the sense that they should only be used where the existing law does not provide for a remedy that fully vindicates the right(s) in question; *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) para 67. Importantly, equalisation payments differ from constitutional damages. Equalisation payments are awarded in terms of specific authorising legislation whereas constitutional damages are awarded in terms of the common law or by relying on the Constitution. See Van der Walt *Constitutional Property Law* 277-280, 367; Strydom *A hundred years of demolition orders* 329, 350-351 and Bishop "Remedies" in *CLOSA* 9-151 in this regard.
[125] Bezuidenhout *Compensation for excessive state action* 246.
[126] Section 39(2) of the Constitution of the Republic of South Africa, 1996.

constitutional damages.[127] In this regard, the Canadian court's four step framework to direct constitutional damages, developed in *Vancouver (City) v Ward*,[128] is discussed. Each of these steps are apposite to South African law.[129] It may become evident that this approach may serve as an example of how the South African courts can establish a framework for direct constitutional damages for State liability under section 38 of the Constitution.[130] Again, it is important to note that this section does not aim to provide a comparative analysis between Charter damages in Canada and constitutional damages in South Africa. Instead, this section aims to draw insight from the framework established in *Ward* to the extent that it may be accommodated within South Africa.[131]

This discussion is followed by an analysis of the use of direct constitutional damages in South African eviction case law. Using the four step framework laid down in *Ward,* coupled with the listed factors in *MEC for the Department of Welfare v Kate*,[132] the discussion of the case law considers whether the use of direct constitutional damages was appropriate. Thereafter, the analysis determines whether employing direct constitutional damages was indeed effective.

The particular facts and circumstances of the *Modderklip* scenario also warrants a further possible perspective. Having regard to the issue of effective relief within the context of damages and possible compensation, Dyal-Chand promotes the concept of "sharing" in light of the interest-outcome approach,[133] as an alternative to resolving property law disputes. Accordingly, while not being an in-depth comparative analysis of the American and South African property law systems, the interest-outcome approach is applied to *Modderklip CC* in order to establish whether the court would have come to a different conclusion had it used the interest-outcome approach. The

[127] Bezuidenhout *Compensation for excessive State action* 251; *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) paras 58-60, 67; Kruger (2014) *SALJ* 330.
[128] 2010 SCC 27 40.
[129] Barns (2013) *Responsa Meridiana* 17.
[130] Barns (2013) *Responsa Meridiana* 22.
[131] Barns (2013) *Responsa Meridiana* 21-22.
[132] 2006 4 SA 478 (SCA). See in general RJ de Beer & S Vettori "The enforcement of socio-economic rights" (2007) 3 *PELJ* 2-26.
[133] See Dyal-Chand (2013) *Connecticut LR* 647-723.

interest-outcome approach may be a viable method of finding or forging effective relief.[134]

The chapter concludes with a comparison between the *Modderklip* scenario and the *Blue Moonlight* saga. The comparison between illustrates when direct constitutional damages will not constitute appropriate or effective relief. Instead, other relief such as the use of a structural interdict may constitute appropriate and possibly, effective relief.

7 4 Chapter 4: Civil contempt of court

Civil contempt of court orders form the focus of Chapter 4. The chapter draws a distinction between orders *ad factum praestadum* and *ad pecuniam solvendam*. It is necessary to make this distinction because the remedies available to enforce compliance with these different types of court orders differ. If the order is *ad factum praestandum*, then the judgment creditor can apply for an order of civil contempt of court by and committal of, the defaulting party.[135] The Constitutional Court's judgment in *Pheko v Ekurhuleni Metropolitan Municipality (No 2)*[136] is discussed in this regard. However, if the judgment creditor is trying to enforce an order *ad pecuniam solvendam*, then he or she can apply to issue a writ of execution, which will lead to the attachment of assets and the consequential sale thereafter.[137] In this regard, the procedure set out in the State Liability Amendment Act 14 of 2011 will be discussed.

Accordingly, where a structural interdict is granted but not adhered to or where indirect or direct constitutional damages are awarded but not paid out to the successful litigant, civil contempt of court proceedings can be instituted to ensure compliance with court orders and ultimately provide effective relief to the affected parties. In this regard, contempt of court orders act as a means of enforcing another remedy, such as a

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[134] *Fose v Minister of Safety and Security* 1997 7 BCLR (CC) para 69; Bishop "Remedies" in *CLOSA* 9-65-9-78; Mbazira *Strategies for effective implementation* 5 read with Dyal-Chand (2013) *Connecticut LR* 677.

[135] NJJ Olivier & C Williams "State Liability for final orders sounding in money: At long last alignment with the Constitution" (2011) *Obiter* 489-520 493.

[136] 2015 6 BCLR 711 (CC). See in general A du Plessis & A van den Berg "Some perspectives on constitutional conflict in local disaster management through the lens of *Pheko v Ekurhuleni Metropolitan Municipality* 2012 2 SA 598 (CC): case note" (2013) 28 *SAPL* 448-468; G Muller "Evicting unlawful occupiers for health and safety reasons in post-apartheid South Africa" (2015) 132 *SALJ* 616-638.

[137] Sections 61-79 of the Magistrate's Court Act 32 of 1944 and sections 36, 39 and 40 of the Supreme Court Act 59 of 1959; R Roos "Statutory mechanisms to enforce judgments debts against the state" (2005) 20 *SA Public Law* 167-175.

structural interdict or constitutional damages; and do not constitute effective relief in itself.

In light of the outcome of the *Pheko* cases,[138] it will also become clear that joinder of the correct defaulting party to the proceedings is crucial for the effective execution of orders *ad factum praestandum* or *ad pecuniam solvendam*.[139]

It is clear that the State has a role to play in the realisation of the land owner's and unlawful occupiers' rights. The State must protect the land owner's property rights and provide the marginalised unlawful occupiers with the means of realising their right to have access to adequate land and housing.

7 5 Chapter 5: Reflection, Recommendations and Conclusions

Chapter 5, catering the final conclusions and recommendations, seeks to provide suggestions that will contribute to the realisation of effective relief for the land owner and unlawful occupier(s) respectively.

In this regard, certain procedural suggestions in relation to the eviction process are discussed. Furthermore, the choice of oversight model and the formulation of the structural interdict may also contribute to the realisation of effective relief. In cases where the structural interdict does not provide for effective relief, alternative relief is needed. In this regard compensation in the form of indirect or direct constitutional damages seems to provide effective relief to some extent. Accordingly, in light of the single-system-of-law principle[140] and subsidiarity principles[141] two options are

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[138] *Pheko v Ekurhuleni Metropolitan Municipality (No 1)* 2012 2 SA 598 (CC); *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* 2015 5 BCLR 711 (CC); *Pheko v Ekurhuleni Metropolitan Municipality (No 3)* (CCT 19/11) [2016] ZACC 20 (26 July 2016). See Chapter 2 at 4 4 and Chapter 4 at 3 1 for a discussion of these cases.

[139] *Meadow Glen Home Owners Association v City of Tshwane Metropolitan Municipality* 2015 1 All SA 299 (SCA) paras 20-22; 24; *City of Johannesburg Metropolitan Municipality v Hlophe* 2015 2 All SA 251 (SCA) paras 18-20 and 25. For a discussion of *City of Johannesburg Metropolitan Municipality v Hlophe* 2015 2 All SA 251 (SCA) see B Ray "Courts, capacity and engagement: Lessons from *Hlophe v City of Johannesburg*: feature" (2013) *ESR Review* 3-5; G Mirugi-Mukundi "Case Review - fundamental constitutional value of accountability requires municipal officials to obey court orders: feature" (2015) *ESR Review* 7-8.

[140] *Ex Parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa* 2000 2 SA 674 (CC) para 44; Van der Walt *Property and Constitution* 19-20; Van der Walt (2008) *CCR* 77.

[141] Van der Walt *Property and Constitution* 36, 40-43, 81-91.

proposed. Firstly, it is recommended that PIE be amended to include an automatic or discretionary right of compensation to cater for situations where there has been an unreasonable delay in the execution of an eviction order. Secondly, in the event that such an amendment is not effected, it is recommended that a general framework for the use of direct constitutional damages be developed.

Chapter 2: The Structural Interdict

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1 Introduction

The well-known principle *ubi jus, ibi remedium* captures the simple yet fundamental idea that rights are of little value absent a remedy that can be executed.[142] The principle warrants that a remedy must either be found[143] or forged by the courts[144] where there is a proven violation of a person's right.[145] In this regard, the South African courts are obligated to provide appropriate and effective relief where it has been established that a constitutional right has been infringed,[146] and the State has a corresponding obligation to ensure the effectiveness of the order granted by the court[147] "for without…remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced".[148]

Where the courts fail to provide an effective remedy it will be in breach of its constitutional duty to provide litigants with appropriate and effective relief as provided for in section 38 of the Constitution.[149] Absent an effective remedy, the State will not only be in breach of its obligation to "respect, protect, promote and fulfil the rights in

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[142]M Kruger "Arbitrary deprivation of property: an argument for the payment of compensation by the state in certain cases of unlawful occupation" (2014) 131 *SALJ* 328 358; DH Ziegler "Rights require remedies: A new approach to the enforcement of rights in the federal courts" (1987) 38 *Hastings LJ* 665 678; E Ling "From paper promises to real remedies: The need for the South African Constitutional Court to adopt structural interdicts in socio-economic rights cases" (2015) 9 *HKJLS* 51 52; S Liebenberg "South Africa's Evolving Jurisprudence on Socio-Economic Rights: An effective tool in challenging poverty?" (2002) 6 *Law, Democracy and Development* 1; DE Hirsch "A defence of structural injunctive remedies in South African law" (2007) 9 *Oregon Review of International Law* 159.

[143] M Bishop "Remedies" in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (RS 6 2014) 9-6.

[144] *Fose v Minister of Safety and Security* 1997 7 BCLR (CC) para 69; W Trengrove "Judicial Remedies for Violations of Socio-economic Rights" (1991) 1 *ESR Review* 8; S Liebenberg *Socio-Economic Rights: Adjudication under a transformative constitution* (2010) 76.

[145] C Mbazira *Strategies for effective implementation of court orders in South Africa*: *You are the "weakest link" in realising socio-economic right: Goodbye* (2008) 5.

[146] Section 38 read with section 172(1)(b) of the Constitution of the Republic of South Africa, 1996; *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 8 BCLR 786 (CC) paras 18 and 33; JM Pienaar *Land Reform* (2014) 765-766; M Ebadolahi "Using structural interdicts and the South African Human Rights Commission to achieve judicial enforcement of economic and social rights in South Africa" (2008) 5 *NYLR* 1565 1574-1579. See also *Fose v Minister of Safety and Security* 1997 7 BCLR (CC) para 69; Bishop "Remedies" in *CLOSA* 9-65-9-78; Mbazira *Strategies for effective implementation* 5; Liebenberg *Socio-Economic Rights* 377-461.

[147] Section 34 read with section 165(4) of the Constitution of the Republic of South Africa, 1996.

[148] *Fose v Minister of Safety* 1997 7 BCLR (CC) para 69 where the court held that "this Court has a particular duty to ensure that within the bounds of the Constitution effective relief be granted for the infringement of any rights entrenched in it"; G Budlender "Remedying Breaches of the Constitution" in J Klaaren *A Delicate Balance: The place of the Judiciary in a Constitutional Democracy* (2006) 84; L Chenwi "Putting flesh on the Skeleton: South African Judicial Enforcement of the Right to Adequate Housing for those subject to Evictions" (2008) 8 *HRLR* 105-137.

[149] Section 38 provides that "anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights."

the Bill of Rights",[150] but it will also be in breach of its constitutional duty to provide measures to ensure the effectiveness of an order granted by a court.[151] This in turn ultimately results in an infringement of the right to access to courts.[152] These constitutional breaches are incompatible with the rule of law,[153] one of the founding values of the South African Republic and threaten the South African constitutional dispensation.[154] In this regard the Constitutional Court in *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* ("Pheko 2")[155] emphasised the importance of executing court orders when it stated that:

> "The rule of law, a foundational value of the Constitution, requires that the dignity and authority of the courts be upheld. This is crucial, as the capacity of the courts to carry out their functions depend on it. As the Constitution commands, orders and decisions issued by a court bind all persons to whom and organs of state to which they apply, and no person or organ of state may interfere, in any manner, with the functioning of the courts. It follows from this that disobedience towards court orders or decisions risks rendering our courts impotent and judicial authority a mere mockery. *The effectiveness of court orders or decisions is substantially determined by the assurance that they will be enforced*" (my emphasis).[156]

Effective relief is therefore needed to uphold the *ubi jus, ibi remedium* principle and to ensure that the rights and interests of all affected parties are realised through State compliance with its constitutional mandate "to respect, protect, promote and fulfil the rights"[157] entrenched in the Constitution.[158]

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[150] Section 7(2) of the Constitution of the Republic of South Africa, 1996; Ling (2015) *HKJLS* 52 and 54. See also Liebenberg *Socio-Economic Rights* 82-87; S Viljoen "The systemic violation of section 26(1): An appeal for structural relief by the judiciary" (2015) 30 *SAPL* 43 44-46.
[151] Viljoen (2015) *SAPL* 42 44.
[152] Section 34 read with section 165(4) of the Constitution of the Republic of South Africa, 1996; *Modderklip Boerdery (Edms) Bpk v President van die Republiek van Suid-Afrika* 2003 1 All SA 465 (T) para 43; M Euijen & C Plasket "Constitutional Protection of Property and Land Reform" (2005) *ASSAL* 429 430-431.
[153] Section 1(c) of the Constitution of the Republic of South Africa, 1996.
[154] *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* (2015) 6 BCLR 711 (CC) para 1.
[155] 2015 6 BCLR 711 (CC). For a discussion of *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* 2015 6 BCLR 711 (CC). See Chapter 4 at 3 1.
[156] *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* 2015 6 BCLR 711 (CC) para 1.
[157] Section 7(2) of the Constitution of the Republic of South Africa, 1996.
[158] Section 7(2) of the Constitution of the Republic of South Africa, 1996.

Effective relief will in essence constitute "*appropriate relief*"[159] for all the affected parties that can be executed within a *reasonable* time.[160] The development and increased use of the structural interdict[161] by the courts in eviction cases can be viewed as an attempt by the courts to forge a new tool and shape an innovative remedy[162] in order to ensure that effective relief is granted.[163]

The court has the power to issue a structural interdict at any time during the course of the eviction process.[164] In this regard, a distinction needs to be drawn between cases where a structural interdict is issued *before*[165] an eviction order is granted and cases

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[159] *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) paras 33-36 in which the court defined 'appropriate relief' as "a remedy that is just and equitable in the circumstances for all the affected parties". See also Chenwi (2008) 8 *HRLR* 108.

[160] G Budlender "Access to Courts" (2004) 121 *SALJ* 339 354; Bishop "Remedies" in *CLOSA* 9-60-9-61 and 9-65 where the author acknowledges that *immediate* relief will constitute the ideal effective relief. However, he argues that *immediate* effective relief is not necessarily attainable and "other considerations will justify affording relief that is less than perfect"; *Hoffmann v South African Airways* 2001 1 SA 1 (CC) para 45.

[161] *Strydom v Minister of Correctional Services* 1999 3 BCLR 342 (W); *Grootboom v Oostenberg Municipality* 2000 3 BCLR 277 (C); *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape* 2001 2 SA 609 (E); *Treatment Action Campaign v Minister of Health* 2002 4 BCLR 356 (T); *Rail Commuter Action Group v Transnet Ltd t/a Metrorail (1)* 2003 5 SA 518 (C); *President van die Republiek van Suid-Afrika v Modderklip Boerdery (Edms) Bpk* 2003 6 BCLR 638 (T); *S v Z and 23 Similar Cases* 2004 1 SACR 400 (E); *City of Cape Town v Rudolph* 2004 5 SA 39 (C); *Minister of Education (Western Cape) v Mikro Primary School* 2006 1 SA 1 (SCA); *Magidimisi v Premier of the Eastern Cape* 2006 JOL 17274 (Ck); *Kiliko v Minister of Home Affairs* 2006 4 SA 114 (C); *EN v the Government of the RSA* 2006 JOL 18038 (D); *Pretoria City Council v Walker* 1998 2 SA 363 (CC); Ebadolahi (2008) *NYLR* 1593-1595 who sets out the development of the structural interdict in the South African context. Although it is beyond the scope of this thesis to undertake a full comparative analysis, as explained, it is helpful to understand the structural interdict in its international historical context. In the United States, structural or 'supervised' interdicts developed in response to the constitutional civil rights era beginning in the mid-1950's. See N Gillespie, *Charter Remedies: The Structural Injunction* (1989-1990) 11 *ADVOC Q* 190, 191-198 which gives an overview of structural injunctions in public interest litigation in the United States, beginning with desegregation cases and extending to cases involving prison and mental hospital reform, public housing, and welfare programmes. See also CF Sabel & W Simon "Destabilization Right: How Public Law Litigation Succeeds" (2004) 117 *Harvard LR* 1016, 1016-1053.

[162] *Fose v Minister of Safety and Security* 1997 7 BCLR (CC) para 69; I Currie & J De Waal *The Bill of Rights Handbook* 6 ed (2013) 199; K Grossenbacher "Implementing Structural Injunctions: Getting a remedy when local officials resist (1992) 80 *George Town LJ* 2227 2232; Viljoen (2015) *SAPL* 43, 58 and 66-68.

[163] In *Minister of Health v Treatment Action Campaign (No 2)* 2002 5 SA 721 (CC) para 106 the Constitutional Court indicated that "a *mandamus* and the exercise of supervisory jurisdiction" may be necessary to ensure an effective remedy for the breach of a constitutional right. See furthermore DL Horowitz *The courts and social policy* (1977) 24 who suggests that in a situation of a recalcitrant State, the courts will have to use all kinds of creative means to protect the values and rights guaranteed in the Constitution. The structural interdict is an example of such creative remedies used to achieve compliance with court orders.

[164] See Chapter 1 at 1 for an overview of the "eviction process".

[165] See a discussion of *Occupiers of 51 Olivia Road Berea Township and 197 Main Street Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC) below at 4 5. See also L Chenwi & S Liebenberg "The constitutional protection of those facing eviction from "bad buildings": case review" (2008) 9 *ESR Review* 12-17; L Chenwi "A new approach to remedies in socio-economic rights adjudication: *Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others*" (2009) 2 *CCR* 371-393; L Chenwi

where a structural interdict is employed *after*[166] granting an eviction order. Where a structural interdict is issued *before* an eviction order is granted, the purpose of the order will be to find a suitable remedy for all parties involved given the circumstances of the case. In this instance the court will not have reached the conclusion yet that it is indeed just and equitable to grant an eviction order.[167] Where the court issues a structural interdict subsequent to the finding that it is just and equitable to grant an eviction order, the purpose of the order will be to execute the eviction order within a reasonable time. Although a structural interdict can be constructed either before or after a court has granted an eviction order, the focus of this chapter primarily falls on the latter.[168] Accordingly, appropriate and effective relief in this particular context will constitute an eviction order granted in terms of the PIE[169] that can be executed within a reasonable time.

A detailed discussion of the structural interdict is warranted in this context because it is often believed to provide effective relief to the land owner and unlawful occupier(s),[170] while also ensuring that the State fulfils its constitutional obligations.[171] Consequently, the aim of this chapter is to determine whether this is indeed the case and furthermore, the extent to which a structural interdict can provide and be regarded as effective relief from the perspective of the land owner; the unlawful occupier(s) and the State.

"'Meaningful engagement' in the realization of socio-economic rights: the South African experience" (2011) 26 *SAPL* 128-156; G Muller "Conceptualising "meaningful engagement" as a deliberative democratic partnership" (2011) 22 *Stell LR* 742-758; S Liebenberg "Engaging paradoxes of the universal and particular in human rights adjudication: the possibilities and pitfalls of 'meaningful engagement'" (2012) 12 *AHRLJ* 1-29 where *Olivia Road* is discussed comprehensively.

[166] See *Modderklip Boerdery (Edms) Bpk v President van die Republiek van Suid-Afrika* 2003 1 All SA 465 (T) below at 4 2; *Pheko v Ekurhuleni Metropolitan Municipality (No 1)* 2012 2 SA 598 (CC) below at 4 4; *Pheko v Ekurhuleni Metropolitan Municipality (No 3)* (CCT 19/11) [2016] ZACC 20 (26 July 2016) below at 4 4 and *Residents of Joe Slovo Community, Western Cape v Thubelisa Homes* 2010 3 SA 454 (CC) below at 4 3.

[167] See also in general G Muller *The impact of section 26 of the Constitution on the Eviction of Squatters in South African Law* LLD Stellenbosch University (2011) and specifically 5, 22-23, 29.

[168] See 4 below.

[169] Sections 4(6) and 6(1) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998. See also *Ndlovo v Ngcobo and Bekker v Jika* 2003 1 SA 113 (SCA) para 23 specifically; Pienaar *Land Reform* 720-723, 734; Muller *The impact of section 26 of the Constitution* 114-115.

[170] C Mbazira *Litigating Socio-Economic Rights in South Africa: A choice between corrective and distributive justice* (2009) 165-166.

[171] Section 165(4) and section 26(2) of the Constitution; *Modderklip Boerdery (Edms) Bpk v President van die Republiek van Suid-Afrika* 2003 1 All SA 465 (T) para 43; *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* 2015 6 BCLR 711 (CC) para 65.

The chapter begins with an exposition of the requirements to succeed with an application for an interdict. In this regard, the same basic requirements need to be established for a party to apply for a structural interdict. Thereafter, a theoretical overview of the structural interdict is given, including a discussion of its nature, scope, function and features. A short discussion of the arguments for and against the use of the structural interdict follows. This discussion is followed by an exposition of the different models of the structural interdict that may be required for different circumstances in the context of evictions. Thereafter, the circumstances under which it will be appropriate to use the structural interdict are discussed with reference to the work of Roach and Budlender.[172] The identification of circumstances under which it will be appropriate to issue a structural interdict may provide examples of when effective relief will be provided in theory. Although the structural interdict may provide effective relief to the respective parties in theory, it is necessary to determine whether such relief is effective in practice. To that end the chapter concludes with a discussion and reflection of selected South African eviction cases to determine whether the use of the structural interdict is indeed effective in practice.

2 The general requirements for an interdict and a structural interdict

The interdict is a summary court order that either prohibits a particular act (a prohibitory interdict)[173] or requires performance of a particular act (a mandatory interdict or a *mandamus*),[174] which can be used both as relief for those whose rights have been violated and as a remedy to deter violations of a similar nature in future.[175] The

[172] K Roach & G Budlender "Mandatory relief and supervisory jurisdiction: when is it appropriate, just and equitable?" (2005) 122 *SALJ* 325.
[173] Liebenberg *Socio-Economic Rights* 409-410; AC Cilliers, C Loots & HC Nel *Herbstein and Van Winsen The civil practice of the High Courts and the Supreme Court of Appeal of South Africa* 5 ed (2009) 1454. See also AJ van der Walt & GJ Pienaar *Introduction to the Law of Property* 7 ed (2016) 224-226; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 308-310 and H Mostert & A Pope (eds) PJ Badenhorst, W Freedman, JM Pienaar & J van Wyk *The principles of The Law of Property in South Africa* (2010) 84-85.
[174] Liebenberg *Socio-Economic Rights* 410-423; *Setlogelo v Setlogelo* 1914 AD 221; *Candid Electronics (Pty) Ltd v Merchandise Buying Syndicate (Pty) Ltd* 1992 2 SA (C); Cillers *et al The civil practice of the High Courts* 1454; J Berryman *The law of equitable remedies* (2000) 12; Van der Walt & Pienaar *Introduction to Property Law* 172, 224; Badenhorst *et al Silberberg and Schoeman's The law of property* 308-310 and Mostert & Pope (eds) *The principles of The Law of Property in South Africa* 84-85.
[175] Mbazira *Litigating Socio-Economic Rights* 166; *Setlogelo v Setlogelo*; 1914 AD 221 Van der Walt & Pienaar *Property Law* 224-226; Badenhorst *et al Silberberg and Schoeman's The law of property* 308-310 and Mostert & Pope (eds) *The principles of The Law of Property in South Africa* 84-85.

interdict is normally employed where other remedies are either not available or when the delays associated with the use of other remedies could cause irreparable harm.[176]

The decision of the Appellate Division in *Setlogelo v Setlogelo* ("Setlogelo")[177] set out the necessary requirements for a prohibitory or mandatory interdict.[178] Firstly, there must be a clear right.[179] Secondly, there must be an injury actually committed or apprehended. In this regard there must be proof of an infringement of a right in an unlawful and continuous way that will cause damage.[180] Finally, the applicant must establish that there is no other alternative, satisfactory remedy available.[181] The alternative legal remedy postulated in this context must be adequate in the circumstances, be ordinary and reasonable and must grant similar protection.[182] The alternative remedy that most frequently arises for consideration in this regard is damages. Depending on the facts and circumstances, the court may use its discretion to determine whether to grant a structural interdict.[183] Even where an applicant could

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[176] Cillers *et al The civil practice of the High Courts* 1455; *Setlogelo v Setlogelo* 1914 AD 221; *Candid Electronics (Pty) Ltd v Merchandise Buying Syndicate (Pty) Ltd* 1992 2 SA (C); Van der Walt & Pienaar *Introduction to Property Law* 172, 224; Badenhorst *et al Silberberg and Schoeman's The law of property* 308-310 and Mostert & Pope (eds) Wyk *The principles of The Law of Property in South Africa* 84-85.

[177] 1914 AD 221; *Setlogelo v Setlogelo* 1914 AD 221; *Candid Electronics (Pty) Ltd v Merchandise Buying Syndicate (Pty) Ltd* 1992 2 SA (C); Van der Walt & Pienaar *Property Law* 224-226; Badenhorst *et al Silberberg and Schoeman's The law of property* 308-310 and Mostert & Pope (eds) *The principles of The Law of Property in South Africa* 84-85.

[178] 1914 Ad 221 para 27; Cillers *et al The civil practice of the High Courts* 1456; N Swanepoel "Die aanwending van die gestruktureerde interdik in die Suid-Afrikaanse konstitusionele regsbedeling: 'n eiesoortige beregtingsproses" (2015) 12 *Litnet Akademies* 374-396 377. See also Van der Walt & Pienaar *Introduction to Property Law* 172, 224; Badenhorst *et al Silberberg and Schoeman's The law of property* 308-310 and Mostert & Pope (eds) *The principles of The Law of Property in South Africa* 84-85.

[179] *Nienaber v Stuckey* 1946 AD 1049; *Bankorp Trust Bpk v Pienaar* 1993 4 SA 215 (N); B Prest *The law and practice of interdicts* (1996) 43 submits that the existence of a right is a matter of substantive law and that whether that right is clearly established is a matter of evidence. This requires proof by the plaintiff, on a balance of probability, of the right which he seeks to protect; Cillers *et al The civil practice of the High Courts* 1457-1463.

[180] Van der Walt & Pienaar *Property Law* 225; Cillers *et al The civil practice of the High Courts* 1464-1467. See also *Setlogelo v Setlogelo* 1914 AD 221; *Candid Electronics (Pty) Ltd v Merchandise Buying Syndicate (Pty) Ltd* 1992 2 SA (C); Badenhorst *et al Silberberg and Schoeman's The law of property* 308-310 and Mostert & Pope (eds) *The principles of The Law of Property in South Africa* 84-85.

[181] Cillers *et al The civil practice of the High Courts* 1467-1470; Van der Walt & Pienaar *Property Law* 225. See also *Setlogelo v Setlogelo* 1914 AD 221; *Candid Electronics (Pty) Ltd v Merchandise Buying Syndicate (Pty) Ltd* 1992 2 SA (C); Badenhorst *et al Silberberg and Schoeman's The law of property* 308-310 and Mostert & Pope (eds) *The principles of The Law of Propery in South Africa* 84-85.

[182] Cillers *et al The civil practice of the High Courts* 1468; *Setlogelo v Setlogelo* 1914 AD 221; *Candid Electronics (Pty) Ltd v Merchandise Buying Syndicate (Pty) Ltd* 1992 2 SA (C); Van der Walt & Pienaar *Property Law* 224-226; Badenhorst *et al Silberberg and Schoeman's The law of property* 308-310 and Mostert & Pope (eds) *The principles of The Law of Property in South Africa* 84-85.

[183] *Candid Electronics (Pty) Ltd v Merchandise Buying Syndicate (Pty) Ltd* 1992 2 SA (C) 326; Cillers *et al The civil practice of the High Courts* 1469; *Setlogelo v Setlogelo* 1914 AD 221. Interestingly, the American approach requires that the plaintiff must show that his or her injury is irreparable with money or that money will not constitute an adequate remedy, in order for the court to grant an interdict. In this

be compensated adequately by an award of damages, the court may still grant an interdict.[184] Importantly, damages will not be considered to be an adequate remedy where there is a continuing violation of the applicant's rights;[185] when the damages will be difficult or impossible to assess; when the applicant is not likely to be able to recover damages from the respondent; or when the value of an award of damages in several years' time will be of questionable adequacy because of inflation.[186]

In the context of evictions, the land owner's right to property[187] and the unlawful occupier's right to have access to adequate housing[188] establish clear constitutional rights that have to be balanced and ultimately upheld.[189] The ongoing failure to execute an eviction order causes a continued infringement of the land owner's right to property and the unlawful occupier's right to adequate housing. Furthermore, a failure to execute the eviction order granted in terms of the PIE is indicative of the fact that there is no other effective remedy available to those whose rights had been violated. In other words, there is no alternative remedy that will remedy the rights' violations. Additionally, the court has the discretion whether or not to grant a mandatory interdict[190] which directs the State to act in accordance with its constitutional obligations by taking positive steps to remedy the rights violations.[191] Ultimately, the mandatory interdict will ensure that effective relief is granted to those whose rights have been violated.[192] In order to ensure that the State adheres to the mandatory order

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regard, a plaintiff's injury will be regarded as *irreparable* by money if it cannot be measured, compensated, restored or repaired. A plaintiff's remedy for damages will be *inadequate* if it will be less efficient, speedy or practical than an interdict. In this regard, the presence of an inadequate remedy is regarded as a prerequisite for injunctive relief to be granted. See D Rendelman "The inadequate remedy at law prerequisite for an injunction" (1981) 33 *University of Florida LR* 346 346 in this regard.

[184] *Candid Electronics (Pty) Ltd v Merchandise Buying Syndicate (Pty) Ltd* 1992 2 SA (C) 327.

[185] *Chapman's Peak Hotel v O'Hagans* 2001 4 All SA 415 (C) at 420.

[186] Cillers *et al The civil practice of the High Courts* 1469.

[187] Section 25(1) of the Constitution of the Republic of South Africa, 1996; Muller *The impact of section 26 of the Constitution* 72. See in general AJ van der Walt *Constitutional Property Law* 3 ed (2011) 17-18 and T Roux "Property" in S Woolman and M Bishop (eds) *Constitutional Law of South Africa* 2 ed (OS 12 2003) 41-1-41-37.

[188] Section 26(1) read with section 26(3) of the Constitution of the Republic of South Africa, 1996. See also *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC); Liebenberg *Socio-Economic Rights* 344-351; Muller *The impact of section 26 of the Constitution* 75-82, 93-99; K McLean "Housing" in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (OS 3 2007) 55-8-5514.

[189] Section 7(2) of the Constitution of the Republic of South Africa, 1996.

[190] *Fose v Minister of Safety* 1997 7 BCLR 851 (CC) para 19; *Minister of Health v Treatment Action Campaign 2* 2002 5 SA 721 (CC) paras 97-98.

[191] K Roach "Crafting remedies for violations of economic, social and cultural rights" in J Squires *et al* (eds) *The road to a remedy: Current issues in the litigation of economic, social and cultural rights* (2005) 111; Liebenberg *Socio-Economic Rights* 410-423; Bishop "Remedies" in *CLOSA* 9-179.

[192] *Fose v Minister of Safety* 1997 7 BCLR 851 (CC) para 19.

granted, it may also be necessary for a court to supervise and monitor the execution of the order granted. The mandatory order granted then becomes what is known as a structural interdict.[193]

3 The structural interdict

3 1 Introduction

Although South African law did not prohibit or limit the power of the courts to grant mandatory structural interdicts during the pre-constitutional era, such orders were not common.[194] The use of structural interdicts is regarded as a recent development, resulting from needs and demands emanating from a transformative constitutional order.[195] The inclusion of a wide range of human rights and corresponding positive constitutional obligations on the State, inevitably led to the increased use of the structural interdict.[196]

3 2 Anatomy of the structural interdict

3 2 1 The nature, scope and purpose of the structural interdict

A structural interdict can be described as a mandatory remedy or interdict that enables a court to retain jurisdiction[197] or oversight over the implementation of its order by the

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[193] Liebenberg *Socio-Economic Rights* 410-423; Cillers *et al The civil practice of the High Courts* (2009) 1454; Berryman *The law of equitable remedies* 12; Van der Walt & Pienaar *Introduction to Property Law* 172, 224; Badenhorst *et al Silberberg and Schoeman's The law of property* 308-310 and Mostert & Pope (eds) *The principles of The Law of Property in South Africa* 84-85.

[194] Roach & Budlender (2005) *SALJ* 328 were the authors note that the structural interdict was frequently used as a remedy in administrative law in the pre-constitutional era. See L Baxter *Administrative Law* (1984) 696-698 for a discussion of structural interdicts before the constitutional era in case law is discussed.

[195] Roach & Budlender (2005) *SALJ* 328; Currie & De Waal *The Bill of Rights* 199.

[196] Currie & De Waal *The Bill of Rights* 199. See in general *Strydom v Minister of Correctional Services* 1999 3 BCLR 342 (W); *Grootboom v Oostenberg Municipality* 2000 3 BCLR 277 (C); *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape* 2001 2 SA 609 (E); *Treatment Action Campaign v Minister of Health* 2002 4 BCLR 356 (T); *Rail Commuter Action Group v Transnet Ltd t/a Metrorail (1)* 2003 5 SA 518 (C); *President van die Republiek van Suid-Afrika v Modderklip Boerdery (Edms) Bpk* 2003 6 BCLR 638 (T); *S v Z and 23 Similar Cases* 2004 1 SACR 400 (E); *City of Cape Town v Rudolph* 2004 5 SA 39 (C); *Minister of Education (Western Cape) v Mikro Primary School* 2006 1 SA 1 (SCA); *Magidimisi v Premier of the Eastern Cape* 2006 JOL 17274 (Ck); *Kiliko v Minister of Home Affairs* 2006 4 SA 114 (C); *EN v the Government of the RSA* 2006 JOL 18038 (D); *Pretoria City Council v Walker* 1998 2 SA 363 (CC).

[197] C Hoexter *Administrative Law in South Africa* (2007) 496; Cillers *et al The civil practice of the High Courts* 1481; Liebenberg *Socio-Economic Rights* 409-411; M du Plessis, G Penfold & J Brickhill *Constitutional Litigation* (2013) 124-125.

State in order to ensure effective relief within a reasonable time.[198] Usually the respondent is required to take prescribed steps within a specified time-frame and report back to court for an assessment of the progress made and, if necessary, for the issue of further orders to effect compliance.[199]

In the context of evictions, the court retains jurisdiction over a case in order to ensure the realisation of effective relief.[200] Where a structural interdict is ordered during the procedural stage of the eviction process[201] the court retains jurisdiction over the matter in order to ensure that the parties formulate an appropriate, reasonable and lawful remedy that will ensure the realisation of the rights of the parties involved in the eviction case. Where a structural interdict is ordered after an eviction order has been granted, the court retains jurisdiction over the case to ensure that the eviction order is executed within a reasonable time in accordance with the plan formulated by the parties. The court may find it necessary to issue either a general,[202] limited[203] or specific[204] structural interdict. Although the form and scope of structural interdicts vary

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[198] This is also referred to as a supervisory order. *Pheko v Ekurhuleni Metropolitan Municipality (No 3)* (CCT 19/11) [2016] ZACC 20 (26 July 2016) para 1; Bishop "Remedies" in *CLOSA* 9-179; Roach & Budlender (2005) 122 *SALJ* 32; Currie & De Waal *Bill of Rights* 199; D Davis "Socio-economic rights in South Africa: The record of the Constitutional Court after 10 years" (2004) 5 *ESR Review* 3 5; Mbazira *Litigating socio-economic rights* 176; Mbazira (2008) *SAJHR* 4.

[199] Cillers *et al The civil practice of the High Courts* 1481; Swanepoel (2015) *Litnet* 378; Viljoen (2015) *SAPL* 58-59.

[200] *Pheko v Ekurhuleni Metropolitan Municipality (No 3)* (CCT 19/11) [2016] ZACC 20 (26 July 2016) para 1.

[201] Before it is determined whether it would be just and equitable to award an eviction order. See for example *Occupiers of 51 Olivia Road v City of Johannesburg* 2008 3 SA 208 (CC) discussed below at 4 5.

[202] See for example *Pheko v Ekurhuleni Metropolitan Municipality (No 1)* 2012 2 SA 598 (CC) at 4 4 3 below where the court issued a general structural interdict requiring the State to identity land in the immediate vicinity for the relocation of the unlawful occupiers; to engage meaningfully with them on the identification of land and to file a report regarding the steps it has taken in compliance with the court order. See also *Pheko v Ekurhuleni Metropolitan Municipality (No 3)* (CCT 19/11) [2016] ZACC 20 (26 July 2016).

[203] See for example *Occupiers of Mooiplaats v Golden Thread Limited* 2012 2 SA 337 (CC) where an eviction order granted against a group of people occupying private land was set aside and remitted to the High Court for reconsideration in light of information that the court ordered the relevant State parties to place before it regarding, amongst other things, the impact the eviction would have on them and making available suitable alternative accommodation to them.

[204] See for example the order in *Residents of Joe Slovo Community, Western Cape v Thubelisa Homes (Centre on Housing Rights and Evictions, Amici Curiae* (*Joe Slovo 1*) 2010 3 SA 454 (CC) where the Constitutional Court issued an extremely detailed, specific interdict. See also L Chenwi "Upgrading of informal settlements and the rights of the poor: the case of Joe Slovo: case review" (2008) 9 *ESR Review* 13-18; L Chenwi & K Tissington "'Sacrificial Lambs' in the quest to eradicate informal settlements. The plight of the Joe Slovo residents: case review" (2009) 10 *ESR Review* 18-24; K McLean "Meaningful engagement: one step forward or two back? Some thoughts on Joe Slovo" (2010) 3 *CCR* 223-242. *City of Johannesburg Metropolitan Municipality v Hlophe* 2015 2 All SA 251 (SCA) para 12 in which the court refers to the extremely specific reporting order of the High Court. However, the Supreme Court of Appeal held: "Objectively the reporting order conveys an intention to give

and are determined by the circumstances and demands of each case,[205] the primary function of the structural interdict is usually to ensure that parties comply with court orders.[206] In this regard, the structural interdict therefore sets out the *manner* in which and the *time* frame for execution. In this context, the provision of land and adequate housing can be considered as an inherent aspect in the execution of the eviction order.[207] Specifically in the context of evictions, the function of the structural interdict would be to ensure that the eviction order granted in terms of PIE is executed systematically and within a reasonable time. Failure by the State to fulfil this constitutional mandate[208] necessitates using the structural interdict to ensure the elimination of systemic violations existing in institutional or organisational settings.[209] Consequently, the purpose of the structural interdict in such situations is not only to provide effective relief to those whose rights have been violated, but also to redress the systemic failures by requiring the State to adhere to its constitutional obligations.[210]

Where the court finds that the steps taken are unreasonable or where the time period has amounted to an unreasonable delay in the execution of the eviction order,[211] the relief granted will not be regarded as effective. Consequently, further alternative

directions to the City in respect of what is required to comply with the constitutional obligations to provide temporary accommodation to homeless persons in general. The questions [in the reporting order] require the City to answer to the notions of the court as to the manner in which obligations could or should be complied with...[but] the reporting order infringes the principle of separation of powers and for that reason…cannot stand" (para 28). For a discussion of the *Hlophe* case see B Ray "Courts, capacity and engagement: Lessons from *Hlophe v City of Johannesburg*: feature" (2013) 27 *ESR Review* 3-5; G Mirugi-Mukundi "Case Review - fundamental constitutional value of accountability requires municipal officials to obey court orders: feature" (2015) 16 *ESR Review* 7-8.

[205] *Minister of Health v Treatment Action Campaign 2* 2002 5 SA 721 (CC) para 129*;* Mbazira *Litigating socio-economic rights* 176.

[206] Liebenberg *Socio-Economic Rights* 425; Bishop "Remedies" in *CLOSA* 9-179.

[207] *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2004 6 SA 40 (SCA) para 26; JM Pienaar "Land reform and housing: Reaching for the rafters or struggling with foundations" (2015) 30 *SAPL* 1-25 7-8.

[208] Section 26(2) and section 165(4) of the Constitution of the Republic of South, 1996. See Muller *The impact of section 26 of the Constitution* 82-93. Furthermore, see in general *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC); Liebenberg *Socio-Economic Rights* 344-351; McLean "Housing" in *CLOSA* 55-8-55-14.

[209] Mbazira *Litigating Socio-Economic Rights* 17; Mbazira (2008) *SAJHR* 4; S Liebenberg "The value of human dignity in interpreting socio-economic rights" (2005) 21 *SAJHR* 1 30.

[210] S Sturm "A normative theory of public law remedies" (1991) 79 *Georgetown LJ* 1355 1357; Bishop "Remedies" in *CLOSA* 9-67; S Liebenberg "Remedial Principles and Meaningful Engagement in Education Rights Disputes" (2016) 19 *PELJ* 1 8.

[211] *Modderklip Boerdery (Edms) Bpk v President van die Republiek van Suid-Afrika* 2003 1 All SA 465 (T); *Residents of Joe Slovo Community, Western Cape v Thubelisa Homes* 2010 2 SA 454 (CC); *Pheko v Ekurhuleni Metropolitan Municipality (No 1)* 2012 2 SA 598 (CC) discussed below at 4 4.

effective relief must then either be found or forged by the courts in order to ensure that the parties' right to an effective remedy is upheld.[212]

3 2 2 The features of the structural interdict

The most prominent feature of the structural interdict is that it provides for a complex ongoing regime of performance,[213] so as to achieve the abovementioned purposes. The ongoing nature of the structural interdict is facilitated by its flexibility and the court's retention of jurisdiction, and sometimes by the court's active participation in the implementation of the order granted.[214]

The structural interdict's flexible characteristic ensures that the remedy can be adapted to the changing circumstances of a particular case. For example, the specificity of the order and/or the model[215] utilised at the beginning of the case may be adapted according to the changing circumstances of each case. Ultimately the formulation of the structural interdict may differ substantially at the beginning and the conclusion of a case.[216]

Although flexibility may cause difficulties in the implementation of the remedy, it can also be argued that it is precisely this feature which contributes to the strengths of this kind of relief.[217] The flexibility makes it possible to revise the remedy without having to institute fresh litigation. The flexibility of the structural interdict also allows for revisiting and restructuring the remedy to accommodate for factors that were not anticipated when the remedy was first designed and implemented. Factors could include changes in the degree of recalcitrance by the State (which could require general or more specific instructions from the court to ensure the compliance with its orders) or engagement (court-ordered or self-imposed) between the parties which could lead to alternative solutions to those proposed by the court.[218]

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[212] Such alternative effective relief constituting constitutional damages and contempt of court is discussed thoroughly in Chapters 3 and 4 below.
[213] Swanepoel (2015) *Litnet* 381-383; Viljoen (2015) *SAPL* 55-57; A Chayes "The role of the judge in public law litigation" (1979) 89 *Harvard LR* 1281 1298.
[214] Mbazira *Litigating socio-economic rights* 177.
[215] See models for supervision below at 3 3.
[216] Mbazira *Litigating socio-economic rights* 180.
[217] Mbazira *Litigating socio-economic rights* 180; R Lawrence *The impact of supervisory orders and structural interdicts in South Africa* LLM University of the Western Cape (2012) 61.
[218] See for example *Residents of Joe Slovo Community, Western Cape v Thubelisa Homes* 2010 3 SA 454 (CC) below at 4 3. See also *Occupiers of 51 Olivia Road Berea Township and 197 Main Street*

The flexible feature of the structural interdict thus enables the court to find and forge the most suitable and effective form of relief, given the gradual or radical changes in circumstances over a period of time. The court will concretise its order only after it has made a final determination and has found the most effective way of remedying the rights violations.[219]

The flexibility feature enables the court to provide latitude to the executive, or the legislative branch of the State, so as to determine the most effective remedy for the violation.[220] Initially, the court may merely require that the violation be remedied. However, the terms of the order granted may be revised by the court and become more specific over time, if for example it is found that there is a continuous lack of compliance with its orders.[221] In this regard a spectrum of factors emerges that may lead to gradual specificity of court orders.[222] Recalcitrance by the State usually leads to supplementary orders by the court, before contempt of court sanctions are resorted to. However, this does not suggest that contempt of court sanctions may never become applicable at the first instance of recalcitrance.[223]

The most peculiar feature of the structural interdict is the court's retention of jurisdiction over the case even after an order has been granted.[224] The retention of jurisdiction over a case disregards the traditional *functus officio* doctrine.[225] This is a necessary

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Johannesburg v City of Johannesburg 2008 3 SA 208 (CC) where it was unnecessary for the court to grant an order with specific instructions because the parties reached a mutually acceptable solution with regard to the steps that had to be taken by the State.

[219] K Cooper-Stephenson "Principle and pragmatism in the law of remedies" in Berryman J (ed) *Remedies, issues and perspectives* (1991) 36; O Fiss *The civil rights interdict* (1978) 36.

[220] DM Davis "Adjudicating Socio-economic Rights in the South African Constitution towards 'deference lite'" (2006) 22 *SAJHR* 301; M Pieters "Coming to terms with judicial enforcement of socio-economic rights" (2004) 20 *SAJHR* 383.

[221] *Residents of Joe Slovo Community, Western Cape v Thubelisa Homes* 2010 3 SA 454 (CC), discussed below at 4 3.

[222] These factors are discussed in more detail below at 3 5.

[223] Fiss *The civil rights interdict* 36-37 states that: "The usual scenario…is for the judge to issue a decree (perhaps a plan formulated by the defendant), to be confronted with disobedience, and then not to inflict contempt but to grant a motion for supplement relief. Then the cycle repeats itself. In each cycle of the supplemental relief process the remedial obligation is defined with greater and greater specificity. Ultimately, after many cycles of supplement decrees, the ordinary contempt sanctions may become realistically available, but the point to emphasise is that it is only then - only at the end of a series- that threat of contempt becomes credible." See Chapter 4 which focuses on civil contempt of court proceedings as a possible remedy to provide effective relief.

[224] Mbazira *Litigating socio-economic rights* 181.

[225] M Pretorius "The origins of the *functus officio* doctrine, with specific reference to its application in administrative law" (2005) 122 *SALJ* 832 sets out a detailed discussion of the *functus officio* doctrine. The doctrine requires that once a court has made a final determination of a matter, its jurisdiction over the case ceases and the case is closed.

feature of the structural interdict in order to ensure that ongoing measures designed to eliminate the rights' violations are executed within a reasonable time.[226] The retention of jurisdiction may also enable parties to reach clarity on the details of the order granted so as to ensure that they are adhering to it. The continued supervision of the court will also enable it to alter its order as new facts or circumstances come to the fore. In principle a negotiated comprise can be reached between the parties in order to secure full implementation of the order,[227] especially where there is evidence that the circumstances surrounding the case have changed.

3 3 Arguments against and in favour of the use of the structural interdict

The separation of powers doctrine requires that the functions of the government be classified as legislative, executive or judicial and that each function be performed by separate branches of government.[228] However, the structural interdict inevitably requires the court to intervene and to take an active administrative role, through ongoing supervision, in order to ensure compliance with its directives.[229] In this regard the use of the structural interdict can often be quite intrusive[230] because it compels action which displaces the discretionary powers and functions usually enjoyed by the executive and/or legislative branches of the State.[231] Currie and De Waal have suggested that it is therefore important that the terms of the order be devised in a flexible manner so as to prevent supervision becoming too intrusive and resulting in blurring the distinction between the executive and judicial functions.[232] Mbazira also notes that the degree of failure and extent of State recalcitrance should dictate the level of judicial intrusion.[233]

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[226] Roach & Budlender (2005) *SALJ* 334; Ling (2015) *HKJLS* 63-64.
[227] Mbazira *Litigating socio-economic rights* 183.
[228] Currie & De Waal *Bill of Rights* 18. See *South African Association of Personal Injury Lawyers v Heath* 2001 1 SA 883 (CC).
[229] A Pillay "South Africa: Access to land and housing" (2007) 5 *IJCL* 544 555.
[230] *Pheko v Ekurhuleni Metropolitan Municipality (No 3)* (CCT 19/11) [2016] ZACC 20 (26 July 2016) para 27.
[231] Currie & De Waal *Bill of Rights* 18; K Grossenbacher "Implementing Structural Injunctions: Getting a Remedy when Local Officials Resist" (1991-1992) 80 *Georgetown LJ* 2231-2232; E Frug "The judicial power of the purse" (1978) *University of Pennsylvania LR* 715-794 734-735; Currie & De Waal *Bill of Rights* 199-200; Lawrence *The impact of supervisory orders and structural interdicts* 62, 64-65.
[232] Currie & De Waal *Bill of Rights* 200.
[233] Mbazira *Litigating socio-economic rights* 195.

The structural interdict is normally employed in situations that involve socio-economic problems,[234] including the provision of adequate housing by the State in eviction cases.[235] Relief that requires the State to take positive actions, such as the provision of housing, raises polycentric issues that affect multiple parties and budgetary priorities.[236] Socio-economic problems involving budgetary allocations and making policy-related choices are considered to be within the exclusive domain of the legislative and executive branches of the State. Mbazira holds that this is because the process of making budgetary allocations and policy choices, such as the provision of housing, gives rise to very difficult questions relating to expenditure, policy and prioritisation.[237] In a country founded on the principle of separation of powers, though not absolute,[238] the combination of power and functions of the legislative, executive and judicial branches of the State[239] will inevitably lead to concerns about the proper allocation of power among the State branches and issues of institutional incompetency.[240]

In this regard, there are those who are concerned with the notion of a judge fashioning structural interdicts that will effectively usurp the discretionary functions of legislative and/or State officials.[241] Some critics might also be uncomfortable with the use of the structural interdict because of the apparent violation of State comity that occurs when a judge mandates action by State officials. In this regard, the Supreme Court of Appeal

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[234] See in general *Strydom v Minister of Correctional Services* 1999 3 BCLR 342 (W); *Grootboom v Oostenberg Municipality* 2000 3 BCLR 277 (C); *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape* 2001 2 SA 609 (E); *Treatment Action Campaign v Minister of Health* 2002 4 BCLR 356 (T); *Rail Commuter Action Group v Transnet Ltd t/a Metrorail (1)* 2003 5 SA 518 (C); *President van die Republiek van Suid-Afrika v Modderklip Boerdery (Edms) Bpk* 2003 6 BCLR 638 (T); *S v Z and 23 Similar Cases* 2004 1 SACR 400 (E); *City of Cape Town v Rudolph* 2004 5 SA 39 (C); *Minister of Education (Western Cape) v Mikro Primary School* 2006 1 SA 1 (SCA); *Magidimisi v Premier of the Eastern Cape* 2006 JOL 17274 (Ck); *Kiliko v Minister of Home Affairs* 2006 4 SA 114 (C); *EN v the Government of the RSA* 2006 JOL 18038 (D); *Pretoria City Council v Walker* 1998 2 SA 363 (CC).
[235] Horowitz *The courts and social policy* 9.
[236] Ebadolahi (2008) 83 *NYLR* 1565 1579-1584; Swanepoel (2015) *Litnet* 384-385.
[237] Mbazira *Litigating socio-economic rights* 192.
[238] *In re Certification of the Constitution of Republic of South Africa (First Certification case)* 1996 10 BCLR 1253 (CC) para 108. See also DM Davis "The relationship between courts and the other arms of government in promoting and protecting socio-economic rights in South Africa: What about separation of power?" (2012) 15 *PELJ* 1-14.
[239] Horowitz *The courts and social policy* 20; Sturm (1991) *Georgetown LJ* 1403.
[240] Viljoen (2015) *SAPL* 54-58; Grossenbacher (1991-1992) *Georgetown LJ* 2227 2233; Ebadolahi (2008) *NYLR* 1597; Currie & De Waal *Bill of Rights* 200; Swanepoel (2015) *Litnet* 383-384.
[241] Grossenbacher (1991-1992) *Georgetown LJ* 2233; *Modder East Squatters v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa v Modderklip Boerdery* 2004 3 All SA 169 (SCA) para 39.

in *Modder East Squatters v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa v Modderklip Boerdery* ("Modderklip SCA")[242] articulated that:

> "Structural interdicts…have a tendency to blur the distinction between the executive and the judiciary and impact on the separation of powers. They intend to deal with policy matters and not with the enforcement of a particular right. Another aspect to take into account is the comity between the different [branches] of the State. Then there is the problem of sensible enforcement: the State must be able to comply with the order within the limits of its capabilities, financial or otherwise. Policies also change, as do requirements, and all this impacts on enforcement".[243]

To some, the willingness of judges to use structural relief represents a fundamental change in the judiciary's view of its own power and not merely a means of addressing new problems.[244] Some fear that the courts will lose its legitimacy as the activity of judges become, at least in the public perception, more politicised and less principled.[245] This concern is however misplaced. Just because State officials are entrusted to make executive or legislative decisions from the outset, does not automatically render their actions correct or constitutional.[246] Courts would not be able to remedy rights violations unless substantive constitutional rights and adjudicative processes that govern them are continually adjusted to maintain their vitality in the face of changing social standards and practices. If, in future, the structural interdict and what it portends for the role of the court in a democratic society causes more problems than it solves, then the court will have to adapt again. It is perhaps better to allow courts more flexibility instead of restricting their function purely on the basis of concerns about where flexibility may lead.[247]

Despite critique against the use of the structural interdict as effective relief, the relief granted can be justified. The concerns postulated above, are outweighed by the fact that the judge may be the only State actor who can ensure a remedy for constitutional

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[242] 2004 3 All SA 169 (SCA). For a discussion of *Modderklip SCA* see A Christmas "Property rights of landowners vs socio-economic rights of occupiers: case review 2" (2004) 5 *ESR Review* 11-13; AJ van der Walt "The state's duty to protect property owners v the State's duty to provide housing: Thoughts on the *Modderklip* case: notes and comments" (2005) 21 *SAJHR* 144-161.
[243] *Modder East Squatters v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa v Modderklip Boerdery* 2004 3 All SA 169 (SCA) para 39.
[244] Viljoen (2015) *SAPL* 54-58. See also A Cox "The new dimension of constitutional litigation" (1976) 51 *Washington LR* 791 821.
[245] Ebadolahi (2008) *NYLR* 1595-1598.
[246] Hirsch (2007) *Oregon Review of International Law* 57.
[247] Grossenbacher (1991-1992) *Georgetown LJ* 2234.

violations, "for without [effective] remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced".[248] Horowitz concedes in this regard that where there is reticence on the part of the other branches of State as regards policy decision making, or the implementation of a remedy, regardless of how imperfect a judicial remedy may be, the structural interdict may be the best available remedy, exactly because of the absence of performance by other branches.[249] When judges act to vindicate constitutional rights they are acting legitimately and in accordance with their constitutional obligations to provide effective relief.[250]

According to Davis:

> "The Court's…refusal to grant structural relief [in the form of a structural interdict] that would empower courts to supervise the implementation of their own orders…in effect [means that it]… [surrenders] its powers to sanction [State] inertia and, as a direct result, litigants have not obtained the shelter…that even a cursory reading of the judgements promised".[251]

As Ebadolahi argues the structural interdict:

> "[P]reserves an active [and legitimate] role for the judiciary, yet *avoids* separation of power problems by requiring appropriate political actors to formulate plans for change. As such, structural interdicts circumvent institutional competence critiques; legislators and/or executive branch officials are required to take action, but are given the necessary flexibility to accommodate polycentric decision making".[252]

The use of a structural interdict thus asserts judicial power and legitimacy in cases where no other judicial remedies are capable of remedying the rights violations. The remedy preserves the court's special role in South Africa's democracy since the supervisory feature of the remedy allows courts to inspect proposed plans to ensure that the State's proposed plans are not constitutionally suspect.[253] Accordingly, the

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[248] *Fose v Minister of Safety* 1997 7 BCLR (CC) para 69.
[249] Horowitz *The courts and social policy* 24.
[250] Grossenbacher (1991-1992) *Georgetown LJ* 2251-2251; A Rycroft "Judicial Innovation and the delinquent state: A note on *The State and Mfezeko Zuba and 23 similar cases*" (2004) 20 *SAHRJ* 321 325.
[251] Davis (2004) *ESR Review* 3, 6.
[252] Ebadolahi (2008) *NYLR* 1596.
[253] Ebadolahi (2008) *NYLR* 1596; Ling (2015) *HKJLS* 63-65.

provision of an effective tool, such as the structural interdict to remedy rights violations, bolsters the integrity of South African courts.

The use of the structural interdict also provides advantages for State bodies. The process of formulating and presenting a plan to the courts is said to improve accountability by assisting state officials to identify the relevant state official or department responsible for ensuring access to and the realisation of specific rights.[254] In appropriate cases, structural interdicts not only require the State to comply with its obligations, but actually assist it to do so better, and in a way that nurtures the democratic process.[255] In this way the adoption and use of the structural interdict also serve to structure a dialogue between the courts and the elected branches of the State.

Properly conceived, structural interdicts have the potential to facilitate the principle of co-operative governance[256] and are particularly suited to a society committed to the values of accountability, responsiveness and openness in a system of democratic governance.[257] However, the virtues of efficiently and effectively providing remedies for constitutional violations will probably not dispel the uneasiness of the possibility that the courts will usurp the powers and functions of the legislative and/or executive branches of the State.[258] Despite critique against and concerns regarding the use of the structural interdict as an effective remedy, the recognition of the power of the courts to grant structural interdicts when necessary was established beyond doubt in *Minister of Health and Others v Treatment Action Campaign (No 2)* ("TAC").[259]

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[254] See the example of *Grootboom v Oostenberg Municipality* 2000 3 BCLR 277 (C) para 293 where the court held: "On the existing evidence it is less than clear on which of the respondents [State officials] within the hierarchy of government the duty to provide shelter [rests]…It is to be hoped that the report which the respondents will have to place before this Court, will clarify this aspect of the matter". See also Lawrence *The impact of supervisory orders and structural interdicts* 66.

[255] Liebenberg (2012) *AHRLJ* 1.

[256] Section 44 of the Constitution of the Republic of South Africa, 1996.

[257] Currie & De Waal *Bill of Rights* 199; P O'Connell *Vindicating Socio-Economic rights: International Standards and Comparative Experiences* (2012) 169 acknowledges that there are conventional criticisms which deem structural interdicts to be undemocratic, because of the judiciary's limited democratic pedigree, but argues that the use of structural interdicts can be "deeply democratising", because "[it] create[s] spaces for dialogue between the courts, the [State] and civil society actors. In this way [the use of the structural interdict] deepen[s] accountability and participation - the key elements of democracy"; *S v Z and 23 similar cases* 2004 4 BCLR 410 (E) para 39.

[258] Grossebacher (1991-1992) *Georgetown LJ* 2257.

[259] 2002 5 SA 721 (CC) para 106; Roach & Budlender (2005) *SALJ* 325.

Having established that the courts have the power to grant structural interdicts,[260] it is still necessary to consider the different models for supervision that can be used to achieve effective relief.

3 4 Models for supervision

3 4 1 Introduction

The structural interdict, as explained, is a remedy that enables a court to retain jurisdiction. While the remedy remains essentially the same, various options or models exist in terms of which the court's oversight may be structured. This section deals with the various models available in principle and how they operate in eviction contexts, in particular.

While not being a fully-fledged legal comparative study it is useful to consider the relevant models for supervision that have developed in America. American jurisprudence is used because the origin of the structural interdict as a constitutional remedy can be traced back to the United States school desegregation cases.[261] Since the initial use of the structural interdict in the school desegregation cases in the United States, the remedy has been utilised to promote constitutional reform in other contexts as well.[262] It may be insightful to explore the various models constructed by American courts in the hope that the utilisation thereof by the South African courts will provide effective relief in theory and in practice.[263] To the extent that it may be accommodated within the South African eviction process specifically, the use of the bargaining, public

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[260] *Minister of Health v Treatment Action Campaign* 2002 5 SA 721 (CC) para 106.
[261] *Brown v Board of Education of Topeka* 347 US 483 (1954) (*Brown 1*) and *Brown v Board of Education of Topeka* 349 US 294 (1955) (*Brown 2*); C Mbazira "From ambivalence to certainty: Norms and principles for the structural interdict in socio-economic rights litigation in South Africa" (2008) 24 *SAJHR* 1-28 4 states these cases were "propelled by the need to realise transformation of the dual school system based on race, into a unitary and non-racial school system. It required a great deal of organisational reform to transform the entrenched racial segregation, which had survived for hundreds of years. The courts were required to transform this entrenched status quo and to reconstruct the social reality in a radical manner. What was required included establishing new procedures for student assignments, new criteria for construction of schools, revision of transport routes, re-assignment of facilities, curricular modifications, reallocation of resources, and above all, establishing equity in the school system. The question is whether all these objectives would have been achieved through the conventional one-stance traditional litigation and remedial procedures. The answer is a definite no; it required protracted and unusual methods of litigation and remediation; hence the resort to the structural interdict to ensure that the obstinate school and local authorities implemented the desired reforms"; Swanepoel (2015) *Litnet* 374-396 379.
[262] Swanepoel (2015) *Litnet* 379. See also D Zaring "National rulemaking through trial courts" (2004) 51 *UCLA LR* 1015-1077.
[263] Mbazira (2008) *SAJHR* 6.

hearing, expert remedial formulation, report back to court and consensual remedial formulation models is explored forthwith. [264]

The models alluded to above provide different processes and methods for oversight, which is key to the structural interdict's anatomy. Because the circumstances linked to eviction cases are diverse, different models for supervision may be required. Depending on the circumstances of each case, different parties with different notions of what will constitute effective relief, may become part of the court proceedings. In this context different affected parties may provide insight and guidance to the courts in determining what will constitute effective relief. In this regard, the particular model employed, therefore impacts on the formulation of the relief granted by the court. The particular formulation may impact on whether relief is effected within a reasonable time. Accordingly, the formulation of the structural interdict and model used for oversight must be structured and used in such a way that when combined, it will suit the very specific circumstances of each case. Changing circumstances, often present in eviction cases, may also justify and require the use of a different model for oversight for obtaining effective relief. In this regard, there is room for the South African courts to explore other models for oversight apart from the report back to court model, which may provide different ways of achieving different outcomes to eviction cases.

Accordingly, each of these models will be discussed below in the hope that it will provide some guidance and insight regarding the methods for executing eviction orders, to the extent that these may be accommodated within the South African eviction process.

3 4 2 The bargaining model

In essence, the bargaining model entails a negotiation process whereby the court, before making a final order, instructs the parties involved in the case to negotiate with one another.[265] The parties will only return to court once an agreement is reached.

[264] Sturm (2001) *Georgetown LJ* 1365-1377; Mbazira (2008) *SAJHR* 6-8.
[265] Sturm (2001) *Georgetown LJ* 1367-1370; Mbazira *Litigating socio-economic rights* 183; Mbazira (2008) *SAJHR* 6; Grossenbacher (1991-1992) *Georgetown LJ* 2232; A Chayes, *The Role of the Judge in Public Law Litigation* (1976) 89 *Harvard LR* 1281 1283-1284; Liebenberg (2012) *AHRLJ*; Swanepoel (2015) *Litnet* 380.

The use of this model embodies a number of advantages, not only to the parties, but to the courts as well. In theory, the negotiation process produces a remedy that is acceptable to all the parties.[266] Acceptance of the formulated remedy is said to ease implementation thereof. The process of negotiation between the parties accords legitimacy to the remedy,[267] because the remedy is said to become "self-imposed" (compared to court-imposed).[268] Accordingly, the court will only rule on aspects which could not be resolved by way of negotiation.[269] Nonetheless, where disagreement arises, the threat of a court-imposed remedy (compared to a self-imposed remedy) may persuade the parties to break the deadlock and reach an agreement. The notion of a "self-imposed" remedy will furthermore shield the court from accusations of interfering in the affairs and functions of the legislative and/or executive branch of the State.[270] Consequently, separation of powers concerns will not deter the courts from enforcing the remedy where there has been a subsequent failure to abide by the remedy initially agreed to by the parties. The court's involvement will not only be viewed as legitimate, but also as necessary to ensure that effective relief is achieved.

Additionally, the process of negotiation and agreement between the parties reduces the burden on the court to resolve all issues. The process of negotiation between the parties may also highlight facts and issues which were either not brought before the court, or were ignored by the court, but were relevant to founding or forging an effective remedy.[271] The concerns raised by the different perspectives of the parties may give rise to factors which could affect the implementation of the remedy.

In the South African context, the possibility exists that the court can instruct the parties involved in an eviction case to negotiate a settlement using a structural interdict.[272] In this regard, the objectives and/or the mechanisms employed resemble "meaningful

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[266] Liebenberg *Socio-Economic Rights* 418.
[267] Mbazira *Litigating socio-economic rights* 184.
[268] O'Connell *Vindicating Socio-Economic rights* 169.
[269] Mbazira *Litigating socio-economic rights* 184.
[270] Mbazira *Litigating socio-economic rights* 184.
[271] Mbazira *Litigating socio-economic rights* 184. See also *Fose v Minister of Safety and Security* 1997 7 BCLR (CC) para 69; Bishop "Remedies" in *CLOSA* 9-65-9-78; Mbazira *Strategies for effective implementation* 5.
[272] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC) where the court issued an interim structural interdict directing the parties to "engage meaningfully" with each other; *Lingwood & Another v The Unlawful Occupiers of R/E of Erf 9 Highlands* 2008 3 BCLR 325 (W) where the court ordered the parties and the City of Johannesburg to engage in mediation to find a suitable solution.

engagement".[273] The courts frequently make use of mandatory interdicts requiring the parties to engage with each other with a view of exploring mutually acceptable solutions to the dispute, including the possibility of securing suitable alternative accommodation for the unlawful occupiers.[274] An interdict requiring the parties to engage meaningfully with one another can either be ordered before the court grants a remedy or it can be coupled with a court order in order to facilitate the execution of the order granted. Consequently, meaningful engagement plays an important role in facilitating effective relief for both the land owner and the unlawful occupier, while ensuring that the State adheres to and gives effect to its constitutional obligation to provide access to adequate housing on a progressive basis.[275]

The case of *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg* ("Olivia Road") [276] is regarded as the leading case in which an order was made before an eviction order was granted requiring the parties to "engage meaningfully" with each other.[277] In short, the Constitutional Court issued an order compelling the parties to negotiate in an attempt to reach an agreement. Active participation from the unlawful occupiers and the State led to an agreement regarding the steps that had to be taken to provide the unlawful occupiers with accommodation. The agreement reached was subsequently endorsed by the court and was made part of the court order.

However, the fact that the model used in *Olivia Road* was successful does not necessarily mean that it will work in other situations, even where the circumstances are similar. If the State is not willing to actively participate and fulfil its obligations,

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[273] See in general Muller *The impact of section 26 of the Constitution* 257-283 for a discussion of "meaningful engagement". See also Liebenberg (2012) *AHRLJ* 1-29.
[274] Liebenberg *Socio-Economic Rights* 418.
[275] Section 26(2) of the Constitution of the Republic of South Africa, 1996. For a comprehensive analysis of the housing rights of unlawful occupiers in the post-1994 constitutional dispensation see Muller *The impact of section 26 of the Constitution* 82-93. Furthermore, see in general *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC); Liebenberg *Socio-Economic Rights* 344-351; McLean "Housing" in *CLOSA* 55-8-55-14.
[276] 2008 3 SA 208 (CC). See a discussion of the case below at 3 5. See also Chenwi & Liebenberg (2008) *ESR Review* 12-17; Chenwi (2009) *CCR* 371-393; Chenwi (2011) *SAPL* 128-156; Muller (2011) *Stell LR* 742-758; Liebenberg (2012) *AHRLJ* 1-29.
[277] Liebenberg *Socio-Economic Rights* 419. The court in *Occupiers of 51 Olivia Road Berea Township and 197 Main Street Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC) also cited its judgment in *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) in which it held that "[an] effective mode of achieving sustainable reconciliations of the different interests involved is to encourage and require the parties to engage with each other in a proactive and honest endeavour to find mutually acceptable solutions" (para 39).

negotiations will be rendered useless. Accordingly, it is evident from *Olivia Road* that the effectiveness of the structural interdict in the form of the bargaining model, is dependent upon the willingness of the State (and the other parties) to participate and collaborate in finding an equitable solution, given the circumstances of the case.[278]

3 4 3 The public hearing model

The public hearing model entails the provision of a legislative committee process which provides for "public hearings and direct informal participation by *interested* parties" (my emphasis).[279] Unlike the bargaining model, which may be restricted to the identified parties involved in the litigation process, the public hearing model allows all parties interested in the case, to participate in the formulation of the remedy.[280] The involvement of a wide range of stakeholders in this regard is necessary to secure the collaboration between the different spheres or departments of the State and the different stakeholders in the remedial process.[281] Mbazira stipulates that this is an effective model in responding to the polycentric interests which may be implicated in the case.[282] In other words, the court conducts a hearing in which all interested parties are invited to participate, often with relaxed rules of evidence.[283] The court then uses the information gathered from the hearings to forge an acceptable and effective remedy.

To date the South African courts have not utilised the public hearing model in the context of eviction cases. However, it can be argued that this would be a suitable model to follow given the polycentric interests that may be implicated in eviction cases. On the other hand, it may complicate eviction matters further and prolong the process of providing effective relief. In such cases where there is an unreasonable delay[284] in finding a suitable remedy, it will render any relief granted ineffective, because it will not be executed within a reasonable time.

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[278] Mbazira (2008) *SAJHR* 21; Ling (2015) *HKJLS* 67-68.
[279] Sturm (1991) *Georgetown LJ* 1370-1371; Mbazira (2008) *SAJHR* 6; Mbazira *Litigating socio-economic rights* 187; Grossenbacher (1991-1992) *Georgetown LJ* 2232; Chayes (1979) *Harvard LR* 1283-1284; Swanepoel (2015) *Litnet* 380-381.
[279] Liebenberg *Socio-Economic Rights* 418.
[280] Chayes (1979) *Harvard LR* 1281.
[281] Mbazira (2008) *SAJHR* 22.
[282] Mbazira (2008) *SAJHR* 6; 21; Chayes (1987) *Harvard LR* 1310.
[283] Bishop "Remedies" in *CLOSA* 9-180.
[284] See Chapter 1 at 2 3 above for a discussion of what constitutes an unreasonable delay.

3 4 4 The expert remedial formulation model

Wherever possible, respectful face-to-face engagement or mediation through a third party should replace arm's-length confrontation by intransigent opponents.[285] The expert remedial formulation model entails the appointment of either an individual or panel of experts responsible for the development of a remedial plan.[286] In this regard the court may choose the individual or panel unilaterally or may base its selection on the recommendation of the parties.[287] The individual or panel then develops a proposed remedy independently.

Experts in structural litigation are not restricted to fact-finding mandates.[288] Instead, the expert's role is to design and propose a remedial plan that will provide effective relief for all those affected.[289] Usually, the remedial plan is then submitted to the court for approval.[290] The expert could even be designated as an administrator with a mandate to take over and manage an institution or State department in need of reform.[291] The court's role throughout, is to ensure that a plan is reasonable and to supervise the execution thereof, within a reasonable time. Like the public hearing model, the expert remedial formulation model is intended to ensure that polycentric interests are considered and that the remedy is acceptable and effective, not only to the parties but also to other members of the community who may play a role in its implementation.[292] It is contended that this model encourages reasoned decision making and fosters the impartiality and independence of the court.[293]

This model is not without its disadvantages. The use of an expert may detract from the need for participation of all interested parties. It is the expert, as opposed to the interested parties, who has the benefit of integrating the range of information and perspectives into an effective remedy.[294] Due to the limited participation by the parties, it may become difficult for the expert to justify particular remedial decisions. If it is

[285] *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 39.
[286] Sturm (1991) *Georgetown LJ* 1371-1372; Swanepoel (2015) *Litnet* 381.
[287] Sturm (1991) *Georgetown LJ* 1372.
[288] Mbazira (2008) *SAJHR* 7; Sturm (1991) *Georgetown LJ* 1419-1420.
[289] Mbazira (2008) *SAJHR* 7; Sturm (1991) *Georgetown LJ* 1419-1420.
[290] Mbazira (2008) *SAJHR* 7; Sturm (1991) *Georgetown LJ* 1419-1420.
[291] Mbazira *Litigating socio-economic rights* 180.
[292] Strum (1991) *Georgetown LJ* 1419-1420; Mbazira *Litigating socio-economic rights* 188.
[293] Strum (1991) *Georgetown LJ* 1419-1420; Mbazira *Litigating socio-economic rights* 188.
[294] Mbazira *Litigating socio-economic rights* 189.

found that the remedial plan was not accepted through consensus or if the plan is not executed within a reasonable time, the court will not be bound by the plan developed by the expert(s). In this regard, it may be necessary for the court to utilise a different model or grant alternative effective relief[295] to the parties.

As mentioned, South African courts have thus far not utilised the expert remedial model in the context of eviction cases. In this regard, it may be advisable for the court to appoint the South African Human Rights Commission ("SAHRC")[296] or a non-governmental organisation ("NGO") as an expert in formulating a remedial plan[297] that will ensure effective relief for all parties. Liebenberg agrees, but postulates that the court may also appoint independent experts or preferably interdisciplinary teams of experts, to assist the court with the supervision of its orders.[298] Ebadolahi envisages the role of the SAHRC to be one that ensures that structural interdicts are executed once litigation has ended.[299] She argues that the increased use of the structural interdict, combined with the collaborative role of the SAHRC as an expert in the formulation of a remedial plan will ensure that effective relief is forged for all parties involved in the eviction proceedings.[300]

If a court finds that the structural interdict will be the appropriate remedy in situations where an eviction order was granted but not executed, then it should order the SAHRC, together with the relevant State actors responsible for the provision of alternative accommodation, to craft an action plan that will adequately remedy the rights violations.[301] Once the plan has been drafted, it will be the responsibility of the SAHRC to provide the court with sufficient and accurate information in relation to the

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[295] Such 'alternative effective relief' is discussed in Chapters 3 and 4.
[296] Section 184 of the Constitution of the Republic of South Africa, 1996 read with section 13(3)(b) of the South African Human Rights Commission Act 40 of 2013 which provides for express litigation powers to initiate cases or join pending cases as *amicus curiae*. For an overview of the role and function of the South African Human Rights Commission see J Klaaren *South African Human Rights Commission* in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (RS 1 2005) 24C-2.
[297] Section 13(1)(a) of the South African Human Rights Commission Act 40 of 2013; NP Ntlama *The implementation of court orders in respect of socio-economic rights in South Africa* LLM Stellenbosch University (2003); K Tissington "Demolishing development at Gabon informal settlement: Public interest litigation beyond Modderklip?" (2011) 27 *SAJHR* 192-205 201.
[298] Liebenberg *Socio-Economic Rights* 436.
[299] Ebadolahi (2008) *NYLR* 1568; Klaaren "South African Human Rights Commission" in *CLOSA* 24C-10 in which he states that "[A]n enhanced supervisory role for the SAHRC may be necessary to ensure effective rights enforcement". See also Ntlama *The implementation of court orders* 46-71.
[300] Ebadolahi (2008) *NYLR* 1565, 1568, 1602-1606.
[301] Ebadolahi (2008) *NYLR* 1602.

steps proposed and/or drafted in the plan. In this regard, the SAHRC can also assist the court in identifying potential weaknesses in the State's proposal, presented for evaluation.[302] Where the State's proposed plan is approved by the court, the most important responsibility of the SAHRC may be to follow up on the implementation of the plan. In this regard, the SAHRC would alleviate the court's burden of ongoing supervision in eviction cases and reduce the costs associated with and necessary to execute a court order, while holding the relevant State officials accountable to the proposed plans.[303] Where the State does not subsequently execute the approved plan within a reasonable time, it will be the role and responsibility of the SAHRC to facilitate or initiate contempt of court or constitutional damages proceedings.[304]

In principle, this methodology will enable the State to ensure that the efficacy of the court is upheld[305] while consequently safeguarding the court's fundamental duty to provide effective relief.[306]

3 4 5 The report back to court model

In essence, the report back to court model "requires the defendant or respondent to report back to the court and other parties to the litigation on the implementation of the order".[307] This is commonly known as a "reporting order".[308] Only where the court is satisfied with the remedial plan, will it become part of the court's final order.[309] The court then proceeds to regulate further engagement between the parties and the implementation of the plan,[310] by way of issuing periodic directives until effective relief is obtained. Subsequently, this process is repeated until the constitutional

[302] Ebadolahi (2008) *NYLR* 1603.
[303] Ebadolahi (2008) *NYLR* 1603.
[304] Ebadolahi (2008) *NYLR* 1603. See also Chapter 3 and 4 respectively for an analysis on the use of constitutional damages and contempt of court proceedings as potential remedies that can provide effective relief where the structural interdict cannot.
[305] Section 164(5) read with section 34 of the Constitution of the Republic of South Africa, 1996; *Modderklip Boerdery (Edms) Bpk v President van die Republiek van Suid-Afrika* 2003 1 All SA 465 (T) para 39.
[306] Section 38 of the Constitution of the Republic of South Africa, 1996. *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) paras 18 and 33. See also *Fose v Minister of Safety and Security* 1997 7 BCLR (CC) para 69; Bishop "Remedies" in *CLOSA* 9-65-78; Mbazira *Strategies for effective implementation* 5; Liebenberg *Socio-Economic Rights* 377-461
[307] Liebenberg *Socio-Economic Rights* 424; Hirsch (2007) *Oregon Review of International Law* 36-27.
[308] Liebenberg *Socio-Economic Rights* 424; Hirsch (2007) *Oregon Review of International Law* 21-22.
[309] Mbazira (2008) *SAJHR* 7.
[310] Liebenberg *Socio-Economic Rights* 424; Currie & De Waal *Bill of Rights* 199.

infringement has been satisfactorily remedied.[311] Although the bargaining model is similar to the report back to court model, there are small differences between the two.

The bargaining model only requires the parties to report back to court once an agreement is reached. The parties are also only required to report back regarding the agreement itself. By comparison, the report back to court model may require the parties not only to negotiate a plan which will give effect to the relevant rights but also to report back to court on a *regular basis*,[312] regardless of whether they have reached an agreement. The report back to court model not only requires periodical reports regarding the negotiation progress between the parties, but also requires reports regarding the implementation of an agreement, once an agreement is reached.

The reporting model holds the advantage that it allows the courts to defer to the elected branches of the State on the most effective way of eliminating the violation. Deference to either the legislature or the executive branch of the State shields the court from accusations that it has usurped functions reserved for the other organs of State.

The report back to court model is the model of the structural interdict most commonly utilised by the South African courts to ensure compliance with court orders.[313] In essence it requires the State to report back to the court with a plan on how the rights violation is intended to be remedied.[314]

Given the common use of the report back to court model in South African jurisprudence, it is possible to identify the composite elements. Firstly, the court declares the respects in which State conduct falls short of its constitutional obligations.[315] Where there has been a failure to execute an eviction order, the court will typically point out that the State has failed to adhere to its duty to provide adequate alternative accommodation. Secondly, the court orders the State to comply with its constitutional obligations.[316] In the context of evictions this would entail obliging the State to provide adequate alternative accommodation. Thirdly, the court orders the State to produce (usually under oath) a report within a specified period of time setting

[311] Liebenberg *Socio-Economic Rights* 424; Currie & De Waal *Bill of Rights* 199.
[312] Liebenberg *Socio-Economic Rights* 424; Currie & De Waal *Bill of Rights* 199.
[313] O'Connell *Vindicating Socio-economic Rights* 55-66.
[314] Mbazira *Litigating socio-economic rights* 189; Mbazira (2008) *SAJHR* 7.
[315] Currie & De Waal *Bill of Rights* 199.
[316] Currie & De Waal *Bill of Rights* 199; Du Plessis *et al Constitutional Litigation* 124.

out what steps it has taken, and what future steps will be taken[317] to remedy the rights violations. In the context of evictions, this would entail a report on the provision of adequate alternative accommodation to the unlawful occupiers. Fourthly, the applicant is afforded an opportunity to respond to the report.[318] The land owner and/or unlawful occupiers are given the chance to raise any objections or concerns regarding the implementation of the plan submitted to the court at this stage.[319] Finally, the matter is enrolled for a hearing and, if satisfactory, the report is made an order of the court.[320] Typically, the court will maintain a supervisory role at this stage in order to ensure that the order granted, based on the report submitted to it, is executed within a reasonable time as determined by the courts or the parties. A situation may result where further court orders follow, either confirming compliance with the original order (i.e. the execution of the eviction order) or enabling further relief, such as constitutional damages or contempt of court proceedings.[321]

The use of the report back to court model will, at the very least, ensure a "response" from the State in the form of a "report" to the court and thereby "account" for a failure to comply with positive obligations imposed by the Bill of Rights.[322]

3 4 6 The consensual remedial formulation model

The consensual remedial formulation model can be viewed as a combination of the bargaining; the public hearing; and the expert remedial formulation model.[323] In essence, the court and the parties can develop mechanisms that involve the interested actors in a process of developing a consensual remedy through joint fact-finding and collaborative decision-making, assisted by a third party.[324]

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[317] Currie & De Waal *Bill of Rights* 199; Du Plessis *et al Constitutional Litigation* 124.
[318] Currie & De Waal *Bill of Rights* 199; Du Plessis *et al Constitutional Litigation* 124.
[319] The order of the Constitutional Court in *Pheko v Ekurhuleni Metropolitan Municipality (No 1)* 2012 2 SA 538 (CC) para 53, for example, contained the first of the four listed elements above. See also the court's more limited structural interdict in *Occupiers of Mooiplaats v Golden Thread Limited* 2012 2 SA 337 (CC).
[320] Currie & De Waal *Bill of Rights* 199.
[321] Du Plessis *et al Constitutional Litigation* 124. See also Currie & De Waal *Bill of Rights* 199 which states that: "A failure to comply with obligations as set out in the court order will then amount to contempt of court".
[322] Currie & De Waal *Bill of Rights* 199-200.
[323] Bishop "Remedies" in *CLOSA* 9-181.
[324] Sturm (2001) *Georgetown LJ* 1373-1374; Mbazira (2008) *SAJHR* 7; Swanepoel (2015) *Litnet Akademies* 381.

Like the bargaining model, this model tries to secure a negotiated agreement between all parties regarding the formulation of an effective remedy.[325] Furthermore, it enables the parties to the litigation, as well as interested third parties, to participate in the formulation of an effective remedy through a less formal process.[326] The process may also entail the appointment of an expert who will assist the parties in finding a solution.[327] The court's role in this regard would be to endorse the chosen remedy. This would entail determining whether the remedy is appropriate given the circumstances of the case. Where the particular result envisaged with the remedy is not achieved, it may be necessary to return to the court. The court will then have to decide whether to adopt a different model or whether to grant alternative effective relief,[328] given the circumstances of the case.

Regardless of the model employed by the court, the structural interdict remains a remedy which is used to direct the party responsible for the violation of constitutional rights to remedy such a breach under court supervision.

Having determined the relevant features, functions and possible models for supervision linked to the structural interdict, it is necessary to explore the particular circumstances that may warrant a structural interdict.

3 5 When is the use of the structural interdict appropriate?

3 5 1 Factors to determine whether is it appropriate to award a structural interdict

The Constitutional Court in *TAC* has held that a structural interdict may be an appropriate remedy when a right in the Bill of Rights has been unjustifiably infringed.[329] Therefore, proof of an infringed constitutional right may act as a threshold in determining whether or not it is appropriate to utilise the structural interdict. Where there has been a failure to execute an eviction order, the respective constitutional

[325] Mbazira (2008) *SAJHR* 8; Sturm (2001) *Georgetown LJ* 1373-1377.
[326] Mbazira (2008) *SAJHR* 8; Sturm (2001) *Georgetown LJ* 1373-1377.
[327] Mbazira (2008) *SAJHR* 8; Sturm (2001) *Georgetown LJ* 1373-1377.
[328] See Chapters 3 and 4.
[329] *Minister of Health v Treatment Action Campaign* 2002 5 SA 721 (CC) para 106; Swanepoel (2015) *Litnet* 287 and 389; G Budlender "Remedying Breaches of the Constitution" in J Klaaren *A Delicate Balance: The place of the Judiciary in a Constitutional Democracy* (2006) 83.

rights of the land owner[330] and the unlawful occupier(s)[331] are violated on a continuous basis. A failure by the State to provide mechanisms to execute a court order within a reasonable time may result in an arbitrary deprivation of the land owner's property rights.[332] The unlawful occupiers are also left without effective relief where the State fails to provide access to land and adequate housing.[333] As a result the land owner and unlawful occupiers' right to an effective remedy becomes redundant.[334] Consequently, the right to have access to courts[335] is also compromised.[336]

Furthermore, the court in *TAC* emphasised that the decision by the court to grant a structural interdict will depend on the circumstances of the case.[337] Although the court in *TAC* found it unnecessary to order a structural interdict it nevertheless indicated that such orders are needed when it is *necessary* to secure compliance with a previous court order.[338] The need to secure compliance will be evident where there is a failure to heed declaratory order or other relief.[339] In determining whether it is *necessary* to secure compliance with a court order by way of a structural interdict, it may be useful to determine the cause of the constitutional breach. Roach and Budlender[340] also argue that the cause of non-compliance may call for a particular remedial technique, since what is effective where the State is simply inattentive to constitutional standards,

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[330] Section 25(1) of the Constitution of the Republic of South Africa, 1996. See also Van der Walt *Constitutional Property Law* 17-18 and Roux "Property" in *CLOSA* 41-1-41-37.
[331] Sections 25(6) and 26(1) of the Constitution of the Republic of South Africa, 1996. See also J van Wyk "The relationship (or not) between the rights of access to land and housing: de-linking land from its components" (2005) 16 *Stell LR* 466-487; *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC); Liebenberg *Socio-Economic Rights* 344-351; Muller *The impact of section 26 of the Constitution* 75-82; McLean "Housing" in *CLOSA* 55-8-55-14.
[332] Section 25(1) of the Constitution of the Republic of South Africa, 1996; *First National Bank of South Africa Ltd t/a Wesbank v Commissioner South African Revenue Service; First National Bank of South Africa Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) which established the test for determining whether a deprivation amounts to a procedurally and/or substantively arbitrary deprivation. See Van der Walt *Constitutional Property Law* 190-333 for a comprehensive discussion of arbitrary deprivations property. See also Roux "Property" in *CLOSA* 46-17-46-28. J Strydom & S Viljoen (Maass) "Unlawful occupation of inner-city buildings: A constitutional analysis of the rights and obligations involved" (2014) 17 *PELJ* 1207 1220, 1222-1223, 1231-1235
[333] Pienaar (2015) *SAPL* 7-8.
[334] Section 38 of the Constitution of the Republic of South Africa, 1996; *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 8 BCLR 786 (CC).
[335] Section 34 of the Constitution of the Republic of South Africa, 1996.
[336] Budlender (2004) *SALJ* 339; *Modderklip Boerdery (Edms) Bpk v President van die Republiek van Suid-Afrika* 2003 1 All SA 465 (T) paras 39-44; *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 8 BCLR 786 (CC).
[337] *Minister of Health v Treatment Action Campaign* 2002 5 SA 721 (CC) paras 102, 107 and 113.
[338] Budlender "Remedying breaches of the Constitution" in *A Delicate Balance* 83.
[339] *Minister of Health v Treatment Action Campaign* 2002 5 SA 721 (CC) para 129.
[340] Roach & Budlender (2005) *SALJ* 345.

may not be effective where the State is incompetent.[341] Alternative remedies such as contempt of court orders may be necessary where the State is simply opposed or intransigent to constitutional standards.[342] Grossenbacher points out that the use of structural interdicts necessarily requires State officials to take affirmative steps.[343] However, these steps can be extremely difficult to implement when relevant officials are unwilling to cooperate.

Therefore, intervention of an intrusive nature is necessary because it is the only remedy that will ensure that the constitutional rights of the landowners and unlawful occupiers will be vindicated: both in theory and in practice.

Three primary reasons for State non-compliance with its constitutional obligations have been identified: inattentiveness, incompetence and intransigence.[344] It is argued that the degree of supervision required should be determined in relation to the attitude of the State towards executing court orders.[345] In other words, the remedy (and the specificity of a court's order) will depend on whether the State's attitude is of an inattentive; incompetent or intransigent nature.[346]

Remedies that are merely persuasive in nature may be sufficient to deal with the situation where the cause of non-compliance is simply inattention on the part of the relevant State actor.[347] In such circumstances, a declaratory order accompanied by a requirement that the State report to the public on its progress[348] *may* be sufficient to remind the defaulter that it has obligations, point out that they have not been fulfilled,

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[341] Roach & Budlender (2005) *SALJ* 345.
[342] Roach & Budlender (2005) *SALJ* 345; Budlender "Remedying breaches of the Constitution" in *A Delicate Balance* 83. See also Chapter 4.
[343] Grossenbacher (1991-1992) *Georgetown LJ* 2230-223; See also S Sturm "Resolving Remedial Dilemma: Strategies of Judicial Intervention in Prisons" (1990) 138 *University of Pennsylvania Law Review* 861-910.
[344] Roach & Budlender (2005) *SALJ* 345-357; Ling (2015) *HKJLS* 56-59. While these reasons shed light on the State's non-compliance of constitutional obligations, the study is not aimed at analysing the reasons *per se*. See, for example, in this regard D Hausman "When and why the South African government disobeys Constitutional Court orders" (2012) 48 *Stanford Journal of International Law* 437-455 452-453.
[345] Roach & Budlender (2005) *SALJ* 345-351.
[346] Roach & Budlender (2005) *SALJ* 345-347. See also K Roach "The Challenges of Crafting Remedies for the Violations of Social, Economic and Cultural Rights" in M Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2009) 46; Budlender "Remedying breaches of the Constitution" in *A Delicate Balance* 86-90.
[347] Roach & Budlender (2005) *SALJ* 346-348; Bishop "Remedies" in *CLOSA* 9-191-9-192.
[348] Bishop "Remedies" in *CLOSA* 9-192.

and bring about prompt and competent action.[349] Bishop identifies two reasons for the reporting requirement.[350] Firstly, the reporting order acts as a safeguard against the possibility that the State is unwilling or incapable as opposed to being truly inattentive. In this regard, the reporting order aims to put continued pressure on the State to comply with the order.[351] Secondly, it serves as a means to keep the public informed of the progress that is being made.[352]

It can be argued that the mere fact of having to report requires the defaulting authority to apply its mind to the problem at hand and encourages the development and implementation of a plan within a reasonable period. However, even in the absence of any bad faith, a declaratory order may not be sufficient to ensure that the relief is effective. This may be the case where the action required from the State is complex and programmatic, or requires reaction by a variety of agencies, some of which may not have been directly involved in the litigation.[353]

Therefore, mere inattentiveness on the part of the relevant State actor will not necessarily warrant using the structural interdict as an appropriate remedy to grant effective relief.

Where the State is aware of its obligations but has nevertheless failed to comply with them, as a result of an admitted lack of capacity or proven incompetence, some form of mandatory relief with court supervision is required. In this regard, supervision is justified because without it the State, even with the best intentions, may not be able to meet its constitutional commitments and obligations.[354] Supervision serves as a means of ensuring that the State will fulfil its constitutional obligations, if it is indeed reasonable and possible.[355] This warrants a closer and more detailed supervisory approach by the court, than would be the case where the State is merely inattentive.

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[349] Roach & Budlender (2005) *SALJ* 346; Bishop "Remedies" in *CLOSA* 9-191-9-192; Budlender "Remedying breaches of the Constitution" in *A Delicate Balance* 86-90.
[350] Bishop "Remedies" in *CLOSA* 9-192; Liebenberg *Socio-Economic Rights* 411-417.
[351] Bishop "Remedies" in *CLOSA* 9-192; Liebenberg *Socio-Economic Rights* 411-417.
[352] Bishop "Remedies" in *CLOSA* 9-192; Liebenberg *Socio-Economic Rights* 411-417.
[353] Swanepoel (2015) *Litnet* 388-389; Roach & Budlender (2005) *SALJ* 334. For example in the case of socio-economic rights litigation, the provision of housing, health or social security may prove to be complex due to resource constraints. There may also be other people in similarly placed positions, such as unlawful occupiers who may have an interest in the litigation. Other agencies such as NGO's or public interest activists may also have an indirect social or financial interest in the litigation.
[354] Roach & Budlender (2005) *SALJ* 350; Bishop "Remedies" in *CLOSA* 9-192-9-193.
[355] Section 7(2) read with sections 25(5) and 26(1) of the Constitution of the Republic of South Africa, 1996.

Supervision in this regard, may also include the use of outside experts to determine what the applicable remedy should be.[356]

A decade ago already, Froneman J stated:

> "[I]n my personal experience [structural interdicts] have contributed to a better understanding on the part of public authorities of their constitutional legal obligations in particular areas, whilst it has also assisted the judiciary in gaining a valuable insight in the difficulties that these authorities encounter in their efforts to comply with their duties".[357]

The applicable remedy will normally be based on an interdict, rather than a declaration. However, depending on the facts of the case, including, for example, the level of incompetence, a structural interdict may also be necessary.[358] While this form of structural interdict involves a more in-depth review of the executive by the judiciary and may result in more burdens being placed on the court, the choice of plan remains squarely within the purview of the executive.[359] Issues such as budgetary and policy concerns would remain under the control of the executive, while the court's only role would be to evaluate whether the executive's plan complies with constitutional standards.[360] The procedural aspects of such an order need not place a significantly greater burden on the courts than would otherwise be the case. This course of action may in fact be resource-efficient, because it avoids the institution of serial litigation on exactly the same issue.[361]

The last category of infringers is the intransigent State. The most invasive remedies should be reserved for these officials or institutions which have acted *mala fides* or have shown a recalcitrant nature.[362]

Remedies in these instances may include detailed supervisory mandatory interdicts enforced by contempt proceedings aimed at deterrence, punishment, and if

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[356] Bishop "Remedies" in *CLOSA* 9-192; Roach & Budlender (2005) *SALJ* 349-350. See also models for supervision as discussed at 3 4 above.
[357] *Magidimisi v Premier of the Eastern Cape* 2006 JOL 17274 (Ck) para 29.
[358] Bishop "Remedies" in *CLOSA* 9-193; *Minister of Health v Treatment Action Campaign (No 2)* 2002 5 SA 721 (CC) paras 102, 107 and 113.
[359] Mbazira (2008) *SAJHR* 9, 12; Roach & Budlender (2005) *SALJ* 349-350; Bishop "Remedies" in *CLOSA* 9-193.
[360] Mbazira (2008) *SAJHR* 9, 12; Roach & Budlender (2005) *SALJ* 349-350.
[361] Mbazira (2008) *SAJHR* 9, 12, 15; Roach & Budlender (2005) *SALJ* 349-350.
[362] Roach & Budlender (2005) *SALJ* 350-351; Bishop "Remedies" in *CLOSA* 9-193.

necessary, incarceration.[363] Where the State's attitude amounts to intransigence or purposeful non-compliance, supervision will be necessary even for the simplest goals in order to ensure, through the threat of contempt[364] that the State does in fact[365] act in accordance with its constitutional obligations. The level of supervision will generally be extremely intrusive, in order to ensure that the State does not avoid or undermine its obligation to comply with the court order.[366] The order will also be accompanied by the immediate threat of contempt in the case of non-compliance.[367] The need to enable the State to determine its own plan to progressively fulfil its constitutional obligations, will give way here, due to the necessity of ensuring that the rule of law is upheld.

Therefore, where it has been established that there has been a breach of a constitutional right enshrined in the Bill of Rights, the State's attitude may be indicative to determine whether the use of the structural interdict will be an appropriate remedy, given the circumstances of the case.[368] Accordingly, the level of supervision required to ensure effective relief is usually aligned with the particular disposition of the State.

Apart from the specific circumstances of each case and the attitude of the State in relation to executing eviction orders there are other factors that can be taken into account in determining whether it will be appropriate to issue a structural interdict. In this regard, Roach and Budlender also provide some guidelines and principles for the use of structural interdicts in constitutional cases in particular.[369]

Firstly, a past failure to comply with court orders, or some other reason to believe that the State may not comply timeously with a court order, may warrant the use of a structural interdict.[370] In this regard, it may also be necessary to determine whether the State will act in good faith in complying with the court order in a timeous manner.[371]

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[363] Roach & Budlender (2005) *SALJ* 345, 350.
[364] See Chapter 4 where contempt of court proceedings are discussed comprehensively.
[365] Bishop "Remedies" in *CLOSA* 9-193.
[366] Roach & Budlender (2005) *SALJ* 345, 350-351; Bishop "Remedies" in *CLOSA* 9-193.
[367] Roach & Budlender (2005) *SALJ* 345, 350-351; Bishop "Remedies" in *CLOSA* 9-193.
[368] Roach & Budlender (2005) *SALJ* 345, 350-351; Bishop "Remedies" in *CLOSA* 9-193.
[369] Roach & Budlender (2005) *SALJ* 327; Budlender "Remedying breaches of the Constitution" in *A Delicate Balance* 84.
[370] Roach & Budlender (2005) *SALJ* 333; Bishop "Remedies" in *CLOSA* 9-189; Swanepoel (2015) *Litnet* 387-388.
[371] Roach & Budlender (2005) *SALJ* 333; Bishop "Remedies" in *CLOSA* 9-189; Swanepoel (2015) *Litnet* 387-388; Budlender "Remedying breaches of the Constitution" in *A Delicate Balance* 85.

Furthermore, good faith can be determined with reference to the nature of the State's attitude, as discussed above.[372]

In *Sibiya and Others v Director of Public Prosecutions, Johannesburg* ("Sibiya 1"),[373] the court ordered a structural interdict in order to enable it to exercise supervisory jurisdiction over the process of converting the sentences of those who had been sentenced to death prior to the decision in *S v Makwanyane*.[374] The process was finally completed by a judgment given on 30 November 2006, in *Sibiya and Others v Director of Public Prosecutions, Johannesburg* ("Sibiya 2") [375] in which the court noted that it had ordered a structural interdict because:

> "The mandamus was…principally aimed at ensuring compliance with the order of this court in Makwanyane. [The court felt that] given the delay that had occurred since its order in Makwanyane coupled with the pressing need for the sentences to be replaced, it was an appropriate case for a supervisory order to be made in addition to the mandamus."[376]

However, proven past non-compliance is not a prerequisite for the court to take steps to ensure compliance. In this regard, *Sibiya 2* makes it clear that it is not only a past failure but also an *anticipated* complete failure to comply with an order which may trigger the use of a structural interdict as effective relief. A structural interdict will also be suitable where the facts indicate that it is inadvisable for the court to assume that the order will be carried out promptly.[377] In other words, the use of a structural interdict will be warranted where there is reason to believe that the State will not completely and promptly comply with an order made by the court.[378]

The use of the structural interdict will only be regarded as effective relief where it is executed within a reasonable time determined by the courts or by the parties through meaningful engagement and where the remedy gives effect to the rights of all parties involved in the eviction case.[379] In other words, where there is evidence that the

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[372] See 3 4 above.
[373] 2005 5 SA 315 (CC).
[374] 1995 3 SA 391 (CC).
[375] 2007 2 BCLR 293 (CC).
[376] *Sibiya v Director of Public Prosecutions, Johannesburg* 2007 2 BCLR 293 (CC) paras 5-6.
[377] *Sibiya v Director of Public Prosecutions, Johannesburg* 2007 2 BCLR 293 (CC) para 61.
[378] Roach & Budlender (2005) *SALJ* 333; Bishop "Remedies" in *CLOSA* 9-189; Swanepoel (2015) *Litnet* 387-388; Budlender "Remedying breaches of the Constitution" in *A Delicate Balance* 85. See 3 4 above.
[379] See Chapter 1 at 2 3 above.

structural interdict will not be executed timeously to give effect to the eviction order, the use thereof will not be appropriate. In these circumstances other remedies may be more suitable.

Secondly, the consequences of non-compliance with the court's order (i.e. the execution of the eviction order granted in terms of PIE) should be taken into account in deciding whether or not to issue a structural interdict.[380] Factors such as the importance of the respective rights at issue and the practical concerns, such as the number of people who will be affected, can be taken into account in determining the severity of the consequences. The likelihood that the court will issue a structural interdict will increase given the severity of the consequences to follow where there is non-compliance with a court order.[381] If, for example, a delay in the execution of a court order is likely to increase the harm suffered by the parties, there would be a stronger case for supervision in the form of a structural interdict.[382]

Thirdly, a structural interdict may be necessary to ensure compliance where the order in question is so general that it is not possible to define with any precision what the State is required to do.[383] General orders may be made either because of the nature of the duty involved or because the court is anxious to leave the State with as much latitude as possible to decide precisely how it will comply with its constitutional obligations.[384] Phrased differently, if there is clarity on the steps that need to be taken to remedy the constitutional violation, then a simple *mandamus* may be sufficient. However, where there is a lack of clarity regarding the steps that have to be taken or where there is a failure to take the steps formulated, either before or after an eviction order was granted, further supervision may be necessary.[385] In such a situation, it is in the interests of all that the State is required to place its plan before the court or at least to make its plan known to the public within a certain time period.[386]

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[380] Roach & Budlender (2005) *SALJ* 333-334; Bishop "Remedies" in *CLOSA* 9-189.
[381] Roach & Budlender (2005) *SALJ* 333-334; Bishop "Remedies" in *CLOSA* 9-189; *MEC Department of Welfare v Kate* 2000 4 SA 478 (SCA); Budlender "Remedying breaches of the Constitution" in *A Delicate Balance* 85.
[382] Roach & Budlender (2005) *SALJ* 334-335; Bishop "Remedies" in *CLOSA* 9-189; *MEC Department of Welfare v Kate* 2000 4 SA 478 (SCA); Swanepoel (2015) *Litnet* 388.
[383] Budlender "Remedying breaches of the Constitution" in *A Delicate Balance* 85-86.
[384] Roach & Budlender (2005) *SALJ* 334; Bishop "Remedies" in *CLOSA* 9-189; *MEC Department of Welfare v Kate* 2000 4 SA 478 (SCA); Swanepoel (2015) *Litnet* 388.
[385] Roach & Budlender (2005) *SALJ* 334-335; Bishop "Remedies" in *CLOSA* 9-189.
[386] Roach & Budlender (2005) *SALJ* 334; Bishop "Remedies" in *CLOSA* 9-189.

In such circumstances, a structural interdict may be beneficial to all parties involved. The approval of a plan (and timeline) by the court can allow the State to move forward with the implementation of its plan, secure in the knowledge that implementation will constitute compliance with its obligations. This provides the State with some flexibility to select the precise means to achieve compliance with the Constitution, within a finite and reasonable period of time. Although there may be cases where it is perfectly clear what steps need to be taken, supervision may still be needed to ensure compliance with such steps as set out in the court's order.[387]

Fourthly, a structural interdict may be suitable where it is desirable that members of the public or unlawful occupiers in a similar situation, and particularly the parties to the dispute who will be directly affected, are informed of what steps are likely to be taken. This is so because of the inherent desirability of their knowing what is likely to happen, and because it creates the opportunity for them to engage in dialogue and debate with those in authority. A reporting order therefore opens up the policy-making process and the implementation process to democratic dialogue. This furthers the constitutional goal of achieving a participatory democracy.[388]

These factors can be used to determine whether it is appropriate to award a structural interdict in eviction cases and have to be considered in alignment with the discussion above.[389]

4 The use of the structural interdict in South African eviction case law

4 1 Introduction

A remedy must be appropriate and effective given the circumstances of each case.[390] In this regard a determination of whether it will be appropriate to award a structural interdict precedes a determination of whether it will constitute effective relief. However,

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[387] Bishop "Remedies" in *CLOSA* 9-189 where he states: "If it is clear, then a simple *mandamus* may be sufficient. If it is unclear, then supervision may be necessary to determine in consultation with all stakeholders what the appropriate relief is. This was the primary motivator of the supervision ordered by the High Court in *Grootboom* and was probably also part of the reasoning in *Kiliko*". Accordingly see *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) and *Kiliko v Minister of Home Affairs* 2006 4 SA 114 (C); *EN v the Government of the RSA* 2006 JOL 18038 (D) in this regard.
[388] Liebenberg (2012) *AHRLJ* 1-30.
[389] See Chapter 2 at 3 4 above.
[390] *Fose v Minister of Safety and Security* 1997 7 BCLR 851 (CC) para 69; Bishop "Remedies" in *CLOSA* 9-65-9-78; Mbazira *Strategies for effective implementation* 5.

a finding that a structural interdict will be appropriate does not necessarily guarantee a finding that it will also provide effective relief. The following cases illustrate this point: *Modderklip Boerdery (Edms) Bpk v President van die Republiek van Suid-Afrika* ("Modderklip HC");[391] *Residents of Joe Slovo Community, Western Cape v Thubelisa Homes* ("Joe Slovo 1");[392] and *Pheko v Ekurhuleni Metropolitan Municipality (No 1)* ("Pheko 1").[393] Although a structural interdict would have been appropriate in each of these cases, it did not provide effective relief to the parties, for various reasons. In this regard, subsequent follow up cases were necessary, ultimately providing for alternative effective relief.

In *Modderklip HC* the court ordered the State to report on the measures it planned to undertake to remedy the rights violations of the land owner while providing adequate alternative accommodation to the unlawful occupiers.[394] However, there was a failure by the State to execute the structural interdict. Subsequently, in *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* ("Modderklip CC")[395] the court held that the remedy of constitutional damages constituted the most effective and expeditious way of vindicating the rights of both the land owner and the occupiers in the circumstances of the case.

In *Joe Slovo 1*, an extremely detailed structural interdict was ordered regarding the relocation of and the provision of alternative accommodation to the unlawful occupiers. However, in *Residents of Joe Slovo Community, Western Cape v Thubelisa Homes* ("Joe Slovo 2")[396] the order was rescinded due to non-compliance. Arguably, the detailed structural interdict was ineffective precisely because it was too detailed.[397] Perhaps if the court had only instructed the parties to engage meaningfully with each other and report back to it, then the structural interdict would have been effective.

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[391] 2003 1 All SA 465 (T). See a detailed discussion of this case below at 4 2.
[392] 2010 3 SA 454 (CC). See a detailed discussion of this case below at 4 3.
[393] 2012 2 SA 598 (CC). See a detailed discussion of this case below at 4 4.
[394] *Modderklip Boerdery (Edms) Bpk v President van die Republiek van Suid-Africa* 2003 1 All SA 465 (T) para 52.
[395] 2005 5 SA 3 (CC). See below at 4 2 4. Furthermore see Chapter 3 at 4 2 for a comprehensive discussion of *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC).
[396] 2011 7 BCLR (CC). See 4 3 4 below.
[397] Bishop "Remedies" in CLOSA 9-189; Roach & Budlender (2005) *SALJ* 334-335; Pienaar *Land Reform* 779.

Ironically through, relief in the form of an *in situ* upgrading of the informal settlement constituted effective relief for the parties.

In *Pheko 1*, the Constitutional Court issued a vague structural interdict instructing the State to file a report regarding the steps it had taken to identify land for the relocation of the unlawful occupiers. The State disregarded this order. Subsequently, in *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* ("Pheko 2")[398] the State officials responsible for executing the court's order in *Pheko 1* were joined to the proceedings.

However, in light of the difficulties associated with finding viable land within the immediate vicinity of Bapsfontein as required by *Pheko 1*,[399] the Constitutional Court in *Pheko v Ekurhuleni Metropolitan Municipality (No 3)* ("Pheko 3"),[400] had to determine whether to discharge its supervisory jurisdiction and whether the matter should be referred to the High Court.[401] The court found that it would be in the best interests of justice to afford the High Court authority in regard to issues relating to the identification of suitable alternative land in the *vicinity*[402] of Bapsfontein for the unlawful occupiers and to supervise the relocation of the unlawful occupiers.[403] While the rights of the unlawful occupiers have not been realised in this regard, it appears that the court, together with the responsible State officials, will ensure the realisation of effective relief in due course. In this regard, the *Pheko* cases illustrate that a combination of remedies, may ensure the realisation of effective relief over time.

The outcome in *Occupiers of 51 Olivia Road Berea Township and 197 Main Street Johannesburg v City of Johannesburg* ("Olivia Road")[404] illustrates that the use of the structural interdict constituted appropriate *and* effective relief. Although the structural interdict in *Olivia Road* was not ordered *after* an eviction order was already

[398] 2015 6 BCLR 711 (CC). For a discussion of *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* 2015 6 BCLR 711 (CC). See Chapter 4 below at 3 1.
[399] *Pheko v Ekurhuleni Metropolitan Municipality (No 3)* (CCT 19/11) [2016] ZACC 20 (26 July 2016) para 14.
[400] (CCT 19/11) [2016] ZACC 20 (26 July 2016).
[401] *Pheko v Ekurhuleni Metropolitan Municipality (No 3)* (CCT 19/11) [2016] ZACC 20 (26 July 2016) para 22. Interestingly, the State opposed the application for the court to discharge the structural interdict. The State's reasoning for this is based on the complexity and practical difficulties associated with implementing the structural interdict in *Pheko 1*.
[402] Note that the word "immediate", as used by the court in *Pheko 1*, has been omitted.
[403] *Pheko v Ekurhuleni Metropolitan Municipality (No 3)* (CCT 19/11) [2016] ZACC 20 (26 July 2016) para 46.
[404] 2008 3 SA 208 (CC).

awarded,[405] it highlights that issuing a structural interdict *before* considering and awarding an eviction order in terms of PIE may provide effective relief. The court, before granting an eviction order, directed the parties to engage meaningfully with each other in an effort to resolve the differences and difficulties aired in the eviction application.[406] The parties were instructed to report back at a later date regarding these deliberations. After two months of intensive negotiations which were effectively overseen by the Constitutional Court, the matter was finally resolved with the occupiers being offered and accepting accommodation in a building yet to be refurbished nearby in the inner city where the residents remain today.

What follows is an evaluation of the use of the structural interdict in these eviction cases. The evaluation requires that the following two questions be answered: Firstly, was it necessary (appropriate) to grant a structural interdict? Secondly, did the structural interdict provide effective relief to the affected parties?

A determination with regard to whether it was appropriate to issue a structural interdict given the facts of each case discussed below requires one to determine whether it was *necessary* to do so.[407] A determination of whether it was appropriate and necessary to grant a structural interdict *in casu* can be established with regard to the factors and circumstances discussed above.[408] In order to determine whether or not the structural interdict provided effective relief in each case, it is necessary to assert whether or not the rights of the respective parties were realised, through State compliance with its constitutional duties.

Depending on the circumstances, continuous non-compliance with the directives of the court to report back to it or failure to implement plans or reports (submitted and approved by the court) within a reasonable time, may render the use of the structural interdict ineffective. Alternative relief, such as constitutional damages[409] or contempt of court proceedings,[410] elaborated on in more detail in Chapters 3 and 4 respectively,

[405] All the other cases analysed further in Chapter 2 discuss the structural interdict as a remedy *after* an eviction order was already granted by the court.
[406] *Occupiers of 51 Olivia Road v City of Johannesburg* 2008 3 SA 208 (CC) para 5.
[407] *Minister of Health v Treatment Action Campaign 2* 2002 5 SA 721 (CC) para 102.
[408] See above at 3 5.
[409] See Chapter 3 in general.
[410] See Chapter 4 in general.

could consequently become necessary where rights were not realised within a reasonable time.

4 2 Modderklip Boerdery (Edms) Bpk v President van die RSA

4 2 1 Introduction

The key issue in *Modderklip Boerdery (Edms) Bpk v President van die Republic van Suid-Afrika* ("Modderklip HC")[411] was the *effective* execution of the eviction order obtained in *Modderklip Boerdery (Pty) Ltd v Modder East Squatters.*[412]

4 2 2 Background and facts of the case

During the 1990s, due to overcrowding, residents of the Daveyton Township began settling on a strip of land between Daveyton and the Modder East farm owned by the applicant. This came to be known as the Chris Hani informal settlement. During the beginning of May 2000 some 400 persons, who had been evicted by the municipality from Chris Hani, moved onto a portion of the privately owned Modder East farm and erected about 50 shacks. By October 2000 there were about 4 000 residential units inhabited by some 18 000 persons.[413] The land owner, Modderklip Boerdery (Pty) Ltd, consequently approached the High Court in October 2000 for an eviction order under PIE. Having successfully obtained an eviction order in April 2001,[414] the unlawful occupiers were required and ordered to vacate the land within two months, failure of which the Sheriff was authorised to evict them. However, whilst the eviction proceedings were pending and even after the granting of the eviction order, the number of unlawful occupiers occupying the land owner's property kept growing exponentially.[415]

On the date set for eviction as determined by the court,[416] the unlawful occupants refused to vacate the land as ordered. The execution of the eviction order was

[411] 2003 1 All SA 465 (T). See in general A Christmas "The Modderklip cases: evictions and the right of access to adequate housing: case review" (2003) 6 *ESR Review* 4-7.
[412] 2001 4 SA 385 (W).
[413] *Modder East Squatters v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa v Modderklip Boerdery* 2004 3 All SA 169 (SCA) para 2; Tissington (2011) *SAJHR* 193.
[414] *Modderklip Boerdery (Pty) Ltd v Modder East Squatters* 2001 4 SA 385 (W).
[415] *Modder East Squatters v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa v Modderklip Boerdery* 2004 3 All SA 169 (SCA) para 3. It was later estimated that there were 40 000 persons of whom a third were illegal immigrants all residing on 50 hectares of the property.
[416] *Modderklip Boerdery (Pty) Ltd v Modder East Squatters* 2001 4 SA 385 (W).

accordingly left to the Sheriff. Due to the large number of unlawful occupiers occupying the land in question, the execution of the eviction order (i.e. the removal of the unlawful occupiers) necessitated the assistance of private contractors.[417] Subsequently, the land owner was informed by the Sheriff that a deposit of R1.8 million (which later increased to R2.2 million) had to be made to facilitate the eviction.[418] Given that the amount required to enlist the help of private contractors exceeded the value of the property being unlawfully occupied, the land owner was not prepared to incur the expense.[419] In this regard, the State adopted the stance that unless the land owner paid the Sheriff the required amount nothing further could be done. The State contended that the land owner seemed to adopt the attitude that in principle he should not bear such costs and that an owner who was serious about urgently vindicating its property would act differently.[420]

Upon a failure by the State to execute the eviction order obtained in *Modderklip Boerdery (Pty) Ltd v Modder East Squatters*[421] the land owner instituted further proceedings, arguing that the authorities were obliged to protect his property by evicting and removing the unlawful occupiers from his land. The judgment of the High Court[422] directing the State to act in accordance with its duty - not only to execute the court order but also to provide alternative land to the occupants - is accordingly discussed below.

4 2 3 The judgment and order of the court

Having regard to the facts of the case, the court found that the land owner had complied with all the necessary procedural and substantive requirements of PIE. [423] Although the land owner complied with all the requirements in PIE, the relief promised

[417] *Modder East Squatters v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa v Modderklip Boerdery* 2004 3 All SA 169 (SCA) para 4.
[418] *Modder East Squatters v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa v Modderklip Boerdery* 2004 3 All SA 169 (SCA) paras 4 and 7; Tissington (2011) *SAJHR* 193.
[419] *Modder East Squatters v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa v Modderklip Boerdery* 2004 3 All SA 169 (SCA) para 4.
[420] *Modderklip Boerdery (Edms) Bpk v President van die Republiek van Suid-Afrika* 2003 1 All SA 465 (T) para 34.
[421] 2001 4 SA 385 (W).
[422] *Modderklip Boerdery (Edms) Bpk v President van die Republiek van Suid-Afrika* 2003 1 All SA 465 (T).
[423] *Modderklip Boerdery (Edms) Bpk v President van die Republiek van Suid-Afrika* 2003 1 All SA 465 (T) para 51 read with *Modder East Squatters v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa v Modderklip Boerdery* 2004 3 All SA 169 (SCA) para 9.

by the legislation was not obtained. In this regard, the court in *Modderklip HC* stated that a balance between the conflicting rights of the land owner and the unlawful occupiers can only be struck if the court's eviction order can be effectively enforced.[424] The Constitution imposes a mandatory obligation on the State to ensure that the rule of law will be upheld. This is evidenced by section 165(4) which provides that "organs of State, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the court".[425] Other measures also referred to include policy measures and concrete action calculated to achieve an intended result.[426]

Mohamed highlights the paradox of the power of the court in a democratic state as follow:

> "There can be no doubt that the depth of the judicial power in the modern [democratic] state is formidable, and in [South Africa] it is arguably even awesome. Independence in the exercise of that power is crucial to the legitimacy of the power…There is an inherent paradox about all this power. Unlike the [legislative] or executive [branch of the State] the court does not have the power of the purse or the army or the police to execute its [orders]. The…courts and the Constitutional Court do not have a single soldier. [The courts] would be impotent to protect the Constitution if the agencies of the [S]tate which controls the…physical and financial resources of the [S]tate refuses to command those resources to enforce the orders of the courts. The courts would be reduced to paper tigers with a ferocious capacity to roar and to snarl but no teeth to bite and no sinews to execute what may then become a piece of sterile scholarship".[427]

The role of section 165(4) is precisely to overcome this paradox.[428] The effectiveness of the courts is dependent on the State's ability to give effect to section 165(4). A failure to assist the court in the effective implementation of its court orders, threatens the rule

[424] *Modderklip Boerdery (Edms) Bpk v President van die Republiek van Suid-Afrika* 2003 1 All SA 465 (T) para 42.
[425] Section 165(4) of the Constitution of the Republic of South Africa, 1996; Tissington (2011) *SAJHR* 194.
[426] *Modderklip Boerdery (Edms) Bpk v President van die Republiek van Suid-Afrika* 2003 2003 1 All SA 465 (T) para 43.
[427] I Mohamed "The Role of the Judiciary in a Constitutional State" (1998) *SALJ* 111, 112. See also Chayes (1976) *Harvard LR* 1283; Chenwi (2009) *ESR Review* 17-19.
[428] *Modderklip Boerdery (Edms) Bpk v President van die Republiek van Suid-Afrika* 2003 1 All SA 465 (T) para 43.

of law.[429] The obligation set out in section 165(4) of the Constitution can therefore be described as the most important and fundamental obligation imposed on the State by the Constitution.[430]

The role and obligations of the relevant organs of State are of paramount importance in order to ensure that the eviction order is executed. Where there is non-compliance with the eviction order granted, it is the duty of the State to ensure the effective execution thereof.[431] The court reiterated that section 7(2), (read with section 165(4)), which requires the State "to respect, protect, promote and fulfil the rights in the Bill of Rights",[432] places an obligation on the State to ensure that an effective remedy will exist for the protection of rights.[433] Therefore, the execution of the eviction order by the relevant organs of State requires the State to act in accordance with its positive obligations encapsulated in section 26(1) of the Constitution.[434] This will ensure that the rule of law[435] is upheld while simultaneously guaranteeing the realisation of the land owner's right not to be deprived of his property arbitrarily and the unlawful occupier's right to access to housing.[436]

Furthermore, the court held that it must not and cannot tolerate or allow a situation where, due to a failure by the State to act in accordance with its constitutional functions and obligations, the court's orders are not effectively carried out.[437]

> "The constitutional right to access to courts would remain an illusion unless orders made by the courts are capable of being enforced by those in whose favour such orders were made. The process of adjudication and resolution of disputes in courts of

[429] *Modderklip Boerdery (Edms) Bpk v President van die Republiek van Suid-Afrika* 2003 1 All SA 465 (T) para 43.
[430] *Modderklip Boerdery (Edms) Pty v President van die Republiek van Suid-Afrika* 2003 1 All SA 465 (T) para 43.
[431] *Modderklip Boerdery (Edms) Pty v President van die Republiek van Suid-Afrika* 2003 1 All SA 465 (T) para 41.
[432] Section 7(2) of the Constitution of the Republic of South Africa, 1996; Tissington (2011) *SAJHR* 194-195.
[433] *Modderklip Boerdery (Edms) Pty v President van die Republiek van Suid-Afrika* 2003 1 All SA 465 (T) para 44.
[434] Section 26(1) of the Constitution of the Republic of South Africa, 1996 reads "Everyone has the right to have access to adequate housing".
[435] Section 1(c) of the Constitution of the Republic of South Africa, 1996.
[436] *Modderklip Boerdery (Edms) Pty v President van die Republiek van Suid-Afrika* 2003 1 All SA 465 (T) para 44; Euijen & Plasket (2005) *ASSAL* 429 430-431.
[437] *Modderklip Boerdery (Edms) Pty v President van die Republiek van Suid-Afrika* 2003 1 All SA 465 (T) para 45 read with paras 41 and 51.

> law is not an end itself but only a means thereto; the end being the enforcement of rights [and/] or obligations defined in the court order".[438]

For organs of State to stand by passively was not only contrary to public policy but in conflict with the foundational values and the provisions of the Constitution. In these circumstances the court has a responsibility to forge an effective remedy and make an appropriate order.[439]

The court made an order *inter alia* declaring that the land owner's right to property[440] had been infringed. The court also stated that the State had an obligation to take reasonable measures to realise the right of the unlawful occupiers to have access to adequate housing and land[441] and that the State had an obligation in terms of section 165(4) of the Constitution to assist in maintaining the efficacy of the precedent court order.[442] Apart from the declaratory order, the court also issued a structural interdict. The structural interdict directed the State to submit a comprehensive plan, under oath and within a specified time period to the court and to the parties, on the measures it planned to undertake.[443]

The court instructed the State to specifically provide for the following in its report. Firstly, the State must facilitate the termination of the infringement of the land owner's right to property within a reasonable time frame, whether by means of expropriation or other measures.[444] Secondly, the State must comply with its commitment in terms of section 165(4) of the Constitution.[445] Thirdly, the State must comply with its obligations

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[438] *Mjeni v Minister of Health and Welfare, Eastern Cape* 2000 (4) SA 446 (Tk) at 453C-D.
[439] *Modderklip Boerdery (Edms) Pty v President van die Republiek van Suid-Afrika* 2003 1 All SA 465 (T) para 50.
[440] Section 25(1) of the Constitution of the Republic of South Africa, 1996. See in general Van der Walt *Constitutional Property Law* 17-18 and Roux "Property" in *CLOSA* 41-1-37.
[441] Section 26(1) read with sections 26(2) and 25(5) of the Constitution of the Republic of South Africa, 1996. See in general *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC); Liebenberg *Socio-Economic Rights* 344-351; Muller *The impact of section 26 of the Constitution* 75-93; McLean "Housing" in *CLOSA* 55-8-66-14; Van Wyk (2005) *Stell LR* 466-487.
[442] *Modderklip Boerdery (Edms) Bpk v President van die Republiek van Suid-Afrika* 2003 1 All SA 465 (T) para 52; Euijen & Plasket (2005) *ASSAL* 429 430-431. See Christmas (2003) *ESR Review* 4-7 for a discussion of the *Modderklip HC* case in general.
[443] *Modderklip Boerdery (Edms) Bpk v President van die Republiek van Suid-Afrika* 2003 1 All SA 465 (T) para 52. The deadline was set for 28 February 2003.
[444] *Modderklip Boerdery (Edms) Bpk v President van die Republiek van Suid-Afrika* 2003 1 All SA 465 (T) para 52 for the order of the court, specifically 52.2.1 of the order.
[445] *Modderklip Boerdery (Edms) Bpk v President van die Republiek van Suid-Afrika* 2003 1 All SA 465 (T) para 52 for the order of the court, specifically 52.2.2 of the order.

in terms of section 25(5), read with sections 26(1) and (2) of the Constitution.[446] Fourthly, the State must prioritise a scheme or schemes for the provision of housing to the unlawful occupiers.[447] Fifthly, the State must provide alternative accommodation to the unlawful occupiers;[448] and lastly, the State must monitor, implement and maintain the proposed plan.[449]

4 2 4 Evaluation of the order granted

4 2 4 1 Was it appropriate to grant a structural interdict?

In casu, the failure to execute an eviction order amounted to a continuous infringement of the land owner's and unlawful occupiers' constitutional rights.[450] In this regard, it is necessary to emphasise that the land owner must have "a [reasonable] degree of patience"[451] pending the execution of the eviction order. However, it cannot be expected of the land owner to be burdened with providing accommodation to unlawful occupiers indefinitely,[452] nor can it be expected of the land owner to execute the order by him or herself.[453] Such obligations rest on the State.[454]

However, De Villiers J accepted that the unconditional removal of the unlawful occupiers was not a viable option.[455] Instead, the court proposed an order in two parts: the first was a declaratory order relating to the State's constitutional obligations

[446] *Modderklip Boerdery (Edms) Bpk v President van die Republiek van Suid-Afrika* 2003 1 All SA 465 (T) para 52 for the order of the court, specifically 52.2.3 of the order.
[447] *Modderklip Boerdery (Edms) Bpk v President van die Republiek van Suid-Afrika* 2003 1 All SA 465 (T) para 52 for the order of the court, specifically 52.2.4 of the order.
[448] *Modderklip Boerdery (Edms) Bpk v President van die Republiek van Suid-Afrika* 2003 1 All SA 465 (T) para 52 for the order of the court, specifically 52.2.5 of the order.
[449] *Modderklip Boerdery (Edms) Bpk v President van die Republiek van Suid-Afrika* 2003 1 All SA 465 (T) para 52 for the order of the court, specifically 52.2.6 of the order.
[450] Sections 26(1) and 25(1) of the Constitution of the Republic of South Africa, 1996; Van der Walt (2005) *SAJHR* 114. See also S Wilson "Breaking the tie: Evictions from private land, homelessness and a new normality" (2009) 126 *SALJ* 270-290; JM Pienaar & H Mostert "Uitsettings onder die Suid-Afrikaanse grondwet: die verhouding tussen artikel 25(1), artikel 26(3) en die Uitsettingswet (slot)" (2006) 3 *TSAR* 522-536.
[451] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39* 2012 2 SA 104 (CC) para 100.
[452] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties* 39 (Pty) Ltd 2012 2 SA 104 (CC) para 100.
[453]L Chenwi "Government's obligation to unlawful occupiers and private landowners" (2010) 11 *ESR Review* 9-11. See also Wilson (2009) *SALJ* 270-290; Pienaar & Mostert "(2006) *TSAR* 522-536.
[454] Section 26(2) read with section 165(4) of the Constitution of the Republic of South Africa, 1996; Chenwi (2010) 11 *ESR Review* 11; Van der Walt (2005) *SAJHR* 114; J van Wyk "The role of Local Government in evictions" (2011) 14 *PELJ* 50.
[455] *Modder East Squatters v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa v Modderklip Boerdery* 2004 3 All SA 169 (SCA) para 18.

towards not only land owners but also the unlawful occupiers, and the second part was a *mandamus* requiring of the state to submit to court a comprehensive plan to solve the problems of the land owner and the unlawful occupiers.[456]

The past failure by the State to execute the eviction order granted in *Modderklip HC*, is another factor indicative, but not determinative, of the fact that the use of the structural interdict may be regarded as appropriate relief. It is accordingly necessary to determine the cause of the failure to execute the eviction order. The cause of the breach can be attributed to the reluctance on the part of the State to act in accordance with its constitutional obligations. In this regard it is accordingly necessary to determine whether the failure was due to the State's inattentiveness, incompetence or intransigence.[457] The State's attitude towards executing the eviction order in favour of the land owner in *Modderklip HC* was arguably of an incompetent or intransigent nature, because the State effectively placed the duty on the land owner by requiring him to pay a deposit of R2.2 million. Arguably, this indicates that the State may be unappreciative and/or lacks the knowledge of what and how it is supposed to address its constitutional duties. The State's attitude towards its constitutional obligations to provide access to adequate housing and ensure the execution of court orders, in this regard, acts as a contributing factor towards the court's decision to issue a structural interdict.

The factors or circumstances of the case dictate that it was appropriate for the court to grant a structural interdict. Consequently, the court utilised the report back to court model as means to provide eventual effective relief to the parties.

Although the court provided guidelines with regard to *what* the report should address, it did not instruct the State on *how* to achieve the plan to be submitted to the court. Furthermore, the court only required of the State to *identify* land for the eventual relocation of the unlawful occupiers. The generality and simplicity of the order indicate that the court still had reason to believe that the State would adhere to its orders in a timeous manner, even after it had failed to do so previously.

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[456] *Modder East Squatters v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa v Modderklip Boerdery* 2004 3 All SA 169 (SCA) para 18.
[457] Roach & Budlender (2005) *SALJ* 345.

If it is accepted that the State's attitude was of an intransigent nature, it can be argued that the court should have acted more intrusively by putting into place specific guidelines on not only what the report should have addressed, but also how it should have been implemented.

4 2 4 2 Did the structural interdict provide effective relief?

Had the State complied with the supervisory order of the court, the rights of the land owner and unlawful occupiers would have been realised and effective relief would have been achieved within a reasonable time. However, instead of submitting a comprehensive plan as directed by the High Court, the State appealed against the decision. Despite the High Court's willingness to grant a structural interdict, the Supreme Court of Appeal in *Modder East Squatters v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa v Modderklip Boerdery* ("Modderklip SCA")[458] and the Constitutional Court in *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* ("Modderklip CC")[459] did not comment on the structural interdict granted by the High Court and found instead that constitutional damages would provide adequate alternative relief. These cases are discussed thoroughly in Chapter 3 where the use of constitutional damages, as alternative effective relief, is elaborated on in more detail.

Although the use of the structural interdict may have been appropriate, it may not have been effective. However, the alternative relief in the form of constitutional damages awarded by the court in *Modderklip SCA*, and confirmed by the court in *Modderklip CC*, constituted appropriate and effective relief.

4 3 Residents of Joe Slovo Community, Western Cape v Thubelisha Homes

4 3 1 Introduction

[458] 2004 3 All SA 169 (SCA). See in general Christmas (2004) *ESR Review* 11-13; Van der Walt (2005) *SAJHR* 144-161.
[459] 2005 5 SA 3 (CC). See in general A Christmas "The *Modderklip* case: the state's obligations in evictions instituted by private landowners: case review" (2005) 4 *ESR Review* 6-10; S Khoza "Questioning the wisdom of moving 40 000 people: the Modderklip saga continues: case review" (2005) 6 *ESR Review* 10-11; Van der Walt (2005) *SAJHR* 144-161 and Tissington (2011) *SAJHR* 192-205.

The case of *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* ("Joe Slovo 1")[460] concerned the eviction of 20 000 people (approximately 4386 households),[461] from their homes in order to facilitate housing development under the N2 Gateway Housing Project.[462] The Constitutional Court, upon finding that the eviction order was just and equitable given the circumstances of the case, granted an extensive mandatory structural interdict relating to the provision of housing to persons who were to be evicted from an informal settlement.[463]

4 3 2 Background and facts of the case

The Joe Slovo Informal Settlement situated alongside the N2 highway in Cape Town, on land owned by the City of Cape Town, was first occupied in the 1990s.[464] It was rife with fire hazards, and living conditions were unsanitary.[465] Initially the settlement had no running water and no toilets, roads or electricity. The Municipality, over time, began to provide the settlement with some basic services such as water, container toilets and rudimentary cleaning. After a devastating fire in 2000,[466] and after some pressure, negotiations and demands,[467] the City had, in terms of its constitutional and

[460] 2010 3 SA 454 (CC). See in general Chenwi (2008) *ESR Review* 13-18; Chenwi & Tissington (2009) *ESR Review* 18-24; McLean (2010) *CCR* 223-242.
[461] *Thubelisha Homes v Various Occupants* 2008 JOL 21559 (C); Chenwi (2008) *ESR Review* 13-18.
[462] LB Juta, KB Moeti & NS Matsiliza "Community participation in South Africa: an assessment of the N2 Gateway Housing Project in Langa/Joe Slovo Township" (2014) 49 *Journal of Public Administration* 1113-1125. The N2 Gateway Housing Project forms part of the national housing policy Breaking New Ground: A Comprehensive Plan for the Development of Sustainable Human Settlements (BNG), introduced in 2004.[462] The aim of the policy is to give effect to the right of access to adequate housing in a manner that promotes sustainable development, wealth creation, poverty alleviation and equity. Properly implemented, the sustainable human settlements so created would provide for a safe and secure environment, with adequate access to economic opportunities, a mix of safe and secure housing and tenure types, reliable and affordable basic services, educational, entertainment and cultural activities, social amenities and health, welfare and police services. An integral part of BNG is the informal settlement upgrading programme, under which the State seeks to eradicate informal settlements through structured *in-situ* upgrading which does not necessarily require relocation and involves minimal disruption to the affected parties, required that the residents be relocated to the temporary relocation areas (TRAs) in order to facilitate the programme. See Chenwi (2008) *ESR Review* 15.
[463] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC) para 24; Pienaar *Land Reform* 776; Chenwi (2008) *ESR Review* 13-18; Chenwi & Tissington (2009) *ESR Review* 18-24; McLean (2010) 3 *CCR* 223-242.
[464] *Thubelisha Homes v Various Occupants* 2008 JOL 21559 (C) para 7; Pienaar *Land Reform* 601.
[465] *Thubelisha Homes v Various Occupants* 2008 JOL 21559 (C) para 8; *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC) para 24; Chenwi (2008) *ESR Review* 15-16.
[466] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC) para 21.
[467] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC) para 22.

legislative obligations, made further provision for substantial services of a more permanent nature,[468] including the provision of tap water, toilets, refuse removal, the lay-out of streets, drainage, connection to the electricity grid and house numbers.[469] These basic municipal services were carried out in an ongoing, long-term fashion.[470] At some point during their subsequent occupation, each of the residents was handed a "red card" by the City, indicating that the holder had applied for housing with the Municipality.[471] Apparently, the question was never raised during the ten years of the settlement's existence, whether the residents had a right to occupy the State-owned land.[472] There was certainly no evidence of the City ever having tried to remove the occupiers. In conclusion, no rights of occupation were formalised and recognised.[473]

Thubelisa Homes was charged with the responsibility to transform the Joe Slovo informal settlement in terms of the national housing policy and to develop formal housing in the area.[474] Consequently, Thubelisa Homes instituted action for the eviction of the occupiers under PIE[475] in the High Court on the grounds that the property in question was being occupied unlawfully as no consent was given for such occupation and that the property was required for development.[476] The occupants argued that they were not unlawful occupiers[477] because they had obtained the necessary consent of the City of Cape Town to occupy the land,[478] and that they should therefore not be evicted. They argued that the supply of basic services and the reconstruction work that had been done by the City after the fire[479] ostensibly indicated

[468] *Residents of Joe Slovo Community, Western Cape v Thubelihsa Homes* 2010 3 SA 454 (CC) para 151.
[469] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC) paras 21 and 151.
[470] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC) para 151.
[471] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC) para 35.
[472] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC) para 22; Pienaar *Land Reform* 691-692.
[473] Pienaar *Land Reform* 692.
[474] *Thubelisha Homes v Various Occupants* 2008 JOL 21559 (C); para 5; Chenwi (2008) *ESR Review* 16.
[475] Section 6 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.
[476] *Thubelisha Homes v Various Occupants* 2008 JOL 21559 (C) para 1.
[477] Section 1 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.
[478] Section 6(1)(a) and section 1(ii) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 state that consent may be "express or tacit […] in writing or otherwise".
[479] *Thubelisha Homes v Various Occupants* 2008 JOL 21559 (C) para 43; Chenwi (2008) *ESR Review* 16; Liebenberg *Socio-Economic Rights* 303-311.

that the City had given its consent to occupy the land.[480] The occupants also depended on the provision of the "red cards". They argued that the cards entitled them to remain in undisturbed possession of their houses.[481] Nomaindia Mfeketo, the previous mayor of Cape Town, denied that consent had been given to occupy the State-owned land. It was argued that the services had been provided for "basic humanitarian reasons"[482] and that the provision thereof should not be construed as consent on the part of the City. It was also contended that the municipality had not granted the residents any enforceable right to remain in the area. It had always been the intention of the State in general to upgrade, move or redevelop informal settlements in conformity with the State's constitutional imperative to provide access to adequate housing on a progressive basis.[483]

In 2008, the High Court found that it would be just and equitable to grant an eviction order, given the fact that the residents were occupying the land unlawfully and without the consent of the owner; that alternative accommodation and transport were provided for and arrangements made by the State to meet the safety, educational and pension needs.[484] The eviction of the occupants was regarded as a strategic move in order to facilitate the State's housing development programme.[485] Interestingly, at this point already Thubelisa Homes, out of their own accord, subjected themselves to what can only be described as a self-imposed structural interdict. They specified that they will subject themselves to judicial supervision and stated that they would report back on the progress and difficulties experienced during the execution and fulfilment of this pilot project.[486] It seems that the applicants wished to keep the court informed of their progress in light of the inevitable envisaged mistakes and consequent corrections thereof associated with launching the pilot project of this kind.[487] Consequently, the

[480] *Thubelisha Homes v Various Occupants* 2008 JOL 21559 (C) para 38; Chenwi (2008) *ESR Review* 16; Liebenberg *Socio-Economic Rights* 303-311.
[481] *Thubelisha Homes v Various Occupants* 2008 JOL 21559 (C) para 40; Chenwi (2008) *ESR Review* 16; Liebenberg *Socio-Economic Rights* 303-311.
[482] *Thubelisha Homes v Various Occupants* 2008 JOL 21559 (C) para 40; Chenwi (2008) *ESR Review* 16; Liebenberg *Socio-Economic Rights* 303-311.
[483] Section 26(1) of the Constitution of the Republic of South Africa, 1996.
[484] *Thubelisha Homes v Various Occupants* 2008 JOL 21559 (C) para 82; Chenwi (2008) *ESR Review* 16; Liebenberg *Socio-Economic Rights* 303-311.
[485] *Thubelisha Homes v Various Occupants* 2008 JOL 21559 (C) para 81; Chenwi (2008) *ESR Review* 16; Liebenberg *Socio-Economic Rights* 303-311.
[486] *Thubelisha Homes v Various Occupants* 2008 JOL 21559 (C) para 81; Chenwi (2008) *ESR Review* 16; Liebenberg *Socio-Economic Rights* 303-311.
[487] *Thubelisha Homes v Various Occupants* 2008 JOL 21559 (C) para 81; Chenwi (2008) *ESR Review* 16; Liebenberg *Socio-Economic Rights* 303-311.

court directed Thubelisa Homes to report back (under oath) to the court at intervals of no less than 8 weeks (but at more frequent intervals should Thubelisa Homes deem it necessary) with regard to the implementation of its order and the allocation of permanent housing opportunities to those affected by the eviction process. The court correspondingly directed the applicants to furnish copies of the affidavits comprising its reporting. The occupiers were also interdicted from returning to Joe Slovo for the purposes of erecting or taking up residence in the informal dwellings, once they had been vacated or evicted.[488]

Subsequently, the residents of Joe Slovo appealed against the decision of the High Court.

4 3 3 The judgment and order of the court

The Constitutional Court in *Joe Slovo 1* handed down 5 separate judgements in support of the final relocation order.[489] The court found that eviction of the occupiers of the Joe Slovo Informal Settlement would be a reasonable measure to facilitate housing development and ensure the progressive realisation of the right to access to adequate housing.[490]

Subsequently, the court granted a detailed and complex structural interdict, regarding the relocation of the unlawful occupiers.[491] In particular, the order stipulated that the unlawful occupiers were to vacate the Joe Slovo Informal Settlement in accordance with the timetable set out by the court. The order to vacate was conditional upon and

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[488] *Thubelisha Homes v Various Occupants* 2008 JOL 21559 (C) para 85; Chenwi (2008) *ESR Review* 16; Liebenberg *Socio-Economic Rights* 303-311.

[489] The court in *Thubelisha Homes v Various Occupants* 2008 JOL 21559 (C) para 81 noted that "This case is not about normal eviction", but rather about the relocation of the unlawful occupiers. However, the relocation of the unlawful occupiers effectively amounts to an eviction. Accordingly, although the term "relocation" is used by the court the case can still be regarded as an eviction case. See also *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2011 7 BCLR (CC) discussed below.

[490] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC) para 7; Chenwi (2008) *ESR Review* 13-18; Chenwi & Tissington (2009) *ESR Review* 18-24; McLean (2010) *CCR* 223-242; Liebenberg *Socio-Economic Rights* 303-311.

[491] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2011 7 BCLR (CC) para 1 where the Constitutional Court described it as a "supervised eviction order". See also Pienaar *Land Reform* 776 and Liebenberg *Socio-Economic Rights* 303-311. See further *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 35 where the court sets out what is expected of the State when providing adequate alternative accommodation. The expectations pertaining to the content of section 26(1) of the Constitution of the Republic of South Africa, 1996 also apply to relocation orders such as in the case of *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2011 7 BCLR (CC); Viljoen (2015) *SAPL* 47.

subject to the unlawful occupiers being relocated to temporary residential units.[492] Additionally, the court order specified in detail the location and quality of the temporary housing units to be provided, including the provision of services and facilities.[493] To further mitigate the eviction it was ordered that the parties engage meaningfully with one another on the details of the relocation of the unlawful occupiers.[494] The court also ordered the State to ensure that 70% of the new homes to be built at Joe Slovo were allocated to current Joe Slovo residents or former residents who had been relocated to make way for the N2 Gateway Project.[495]

To ensure the effective implementation of the order, the court also placed a reporting obligation on the parties. The court required the parties to report back, within a specified time frame on the implementation of the order and the allocation of permanent housing opportunities to those affected by the order.[496] The court also showed some flexibility in its order by allowing any party to approach the court for an amendment, supplementation or variation of the order should the order not be complied with or otherwise give rise to unforeseen difficulties.[497]

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[492] *Residents of Joe Slovo Community, Western Cape v Thubelisa Homes* 2010 3 SA 454 (CC) para 7.4; Chenwi (2008) *ESR Review* 13-18; Chenwi & Tissington (2009) *ESR Review* 18-24; McLean (2010) *CCR* 223-242; Liebenberg *Socio-Economic Rights* 303-311.

[493] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC) para 7.8, 7.9, 7.10; Chenwi & Tissington (2009) *ESR Review* 18-23; Pienaar *Land Reform* 777; Liebenberg *Socio-Economic Rights* 303-311.

[494] See *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC) para 7.11 for a comprehensive list of points set out by the court for engagement by the parties.

[495] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC) para 7.17; Chenwi (2008) *ESR Review* 13-18; Chenwi & Tissington (2009) *ESR Review* 18-24; McLean (2010) *CCR* 223-242; Liebenberg *Socio-Economic Rights* 303-311.

[496] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC) para 7.16; Chenwi (2008) *ESR Review* 13-18; Chenwi & Tissington (2009) *ESR Review* 18-24; McLean (2010) *CCR* 223-242; Liebenberg *Socio-Economic Rights* 303-311.

[497] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC) para 7.21; Chenwi (2008) *ESR Review* 13-18; Chenwi & Tissington (2009) *ESR Review* 18-24; McLean (2010) *CCR* 223-242; Liebenberg *Socio-Economic Rights* 303-311.

4 3 4 Evaluation of the order granted

4 3 4 1 Was it appropriate to grant a structural interdict?

It is clear from the facts that the unlawful occupiers had a right to access to adequate housing[498] and the right not to be evicted without a court order.[499]

As explained, the particular disposition or attitude of the State can also be indicative or a guiding factor of whether it is necessary to issue a structural interdict.[500] At first, the attitude of the State in this regard pointed to a willingness to engage with the unlawful occupiers in providing temporary housing units while upgrading the informal settlement for their benefit.[501] At first glance, there was reason to believe that the State would comply with the eviction and relocation process.[502]

However, other factors also need to be considered, including the consequences of non-compliance of the court order; the importance of the rights at hand and the practical concerns posed by the circumstances of the case.[503] Non-compliance with the systematic relocation process would render the unlawful occupiers homeless.[504] Not only will this infringe their right to access to adequate housing, but their right to dignity[505] will also be infringed. Practical concerns, such as the number of affected persons were also pertinent in this case. An unreasonable delay in the provision of temporary housing units and a failure to relocate the unlawful occupiers gradually and systematically would have rendered over 20 000 people (approximately 4386 households) homeless.[506]

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[498] Section 26(1) of the Constitution of the Republic of South Africa, 1996. See in general *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC); Liebenberg *Socio-Economic Rights* 344-351; Muller *The impact of section 26 of the Constitution* 75-82; McLean "Housing" in *CLOSA* 55-8-55-14.
[499] Section 26(3) of the Constitution of the Republic of South Africa, 1996 read with the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998. See Muller *The impact of section 26 of the Constitution* 82-93. Furthermore, see in general *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC); Liebenberg *Socio-Economic Rights* 344-351; McLean "Housing" in *CLOSA* 55-8-55-14.
[500] Roach & Budlender (2005) *SALJ* 345.
[501] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC) para 31; *Thubelisha Homes v Various Occupants* 2008 JOL 21559 (C) para 13.
[502] Roach & Budlender (2005) *SALJ* 333.
[503] Roach & Budlender (2005) *SALJ* 334.
[504] Wilson (2009) *SALJ* 270, 273.
[505] Section 10 of the Constitution of the Republic of South Africa, 1996.
[506] Roach & Budlender (2005) *SALJ* 333.

Moreover, given the fact that there was a clear indication that the majority of residents would not relocate without a court order[507] and the Programme would better the lives of those residing in the Joe Slovo settlement, a structural interdict was necessary to facilitate the systematic and gradual relocation process.

4 3 4 2 Did the structural interdict provide effective relief?

Although it is evident that the structural interdict was intended to provide structured and comprehensive effective relief to the unlawful occupiers of the Joe Slovo Informal Settlement, it is still to be determined whether substantive effective relief was the actual outcome.

> "[I]nstrumental to the execution of the order was a detailed process for the systematic transfer of all the people occupying the settlement to certain temporary accommodation. In order…[for the execution of the structural interdict]…to be successful, it was imperative that all role players cooperated and stuck to the timetable. Although amendments to the timetable were possible…[parties had to engage and reach] agreements to that effect".[508]

Failure by the State to set the relocation process in motion and unforeseen cost implications regarding the relocation of unlawful occupiers and provision of temporary alternative accommodation[509] were precisely what hampered the execution of the court order from the outset.[510] This led to a subsequent order by the Constitutional Court suspending the evictions until further notice.

In this regard Western Cape provincial Minister of Housing, Bonginkosi Madikizela, submitted a report to the court stating that the costs of the relocation of the unlawful occupiers might exceed the upgrading costs and therefore a suspension of the eviction order previously granted was warranted.[511] The Minister also raised concerns about the absence of a plan regarding those who would not be accommodated in the new housing in Joe Slovo, since the number of unlawful occupiers exceeded the number

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[507] *Thubelisha Homes v Various Occupants* 2008 JOL 21559 (C) para 13.
[508] Pienaar *Land Reform* 777.
[509] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2011 7 BCLR (CC) para 5-15.
[510] Pienaar *Land Reform* 778.
[511] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2011 7 BCLR (CC) para 32; Chenwi (2008) *ESR Review* 13-18; Liebenberg *Socio-Economic Rights* 303-311.

of available houses.[512] In effect, the entire structural interdict stood to be suspended in light of the concerns raised by the Minister.

Furthermore, immediately after the detailed structural interdict was granted, the parties apparently had second thoughts about whether the relocation order[513] was appropriate and effective.[514]

In this regard, Pienaar notes that:

> "A miscommunication was evident: the court sought feedback on negotiations amending relocation timetables whereas the reports furnished information about whether the relocation ought to take place at all".[515]

Increasingly, the reports submitted to the court favoured *in situ* upgrading over the supervisory relocation order granted by the court. The scope and objectives of the structural interdict were seemingly completely ignored by the parties.

Subsequently, the Constitutional Court in *Residents of Joe Slovo Community, Western Cape v Thubelisa Homes* ("Joe Slovo 2")[516] had to determine whether the relocation order, coupled with a supervisory order concerning the execution of that order, could be or should be rescinded or discharged in light of the changed circumstances.[517]

The court found that it had some leeway to discharge an order where the circumstances that gave rise to the grant of the eviction order changed *before* the eviction order originally issued has been executed and/or the order is no longer competent.[518] The court found that it will only have a discretion to discharge its orders where the change is necessitated by exceptional circumstances and considerations of justice and equity.[519] Consequently, the court had to determine whether there were

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[512] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2011 7 BCLR (CC) para 10.
[513] The court in *Thubelisha Homes v Various Occupants* 2008 JOL 21559 (C) para 81 noted that the case centred on the relocation of the unlawful occupiers and that this case did not amount to a normal eviction. Although the term "relocation" is used by the court, the court order amounts to an eviction. Therefore, the case can still be regarded as an eviction case for purposes of this study.
[514] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2011 7 BCLR (CC) para 6; Pienaar *Land Reform* 778; Liebenberg *Socio-Economic Rights* 303-311.
[515] Pienaar *Land Reform* 778; Liebenberg *Socio-Economic Rights* 303-311.
[516] 2011 7 BCLR (CC).
[517] Pienaar *Land Reform* 777; Liebenberg *Socio-Economic Rights* 303-311.
[518] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2011 7 BCLR (CC) para 28.
[519] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2011 7 BCLR (CC) paras 23 and28.

exceptional circumstances and/or considerations of justice and equity present to warrant the rescindment of the structural interdict granted in *Joe Slovo 1*. In this regard, the court found that it was indeed just and equitable to discharge said order given the following exceptional circumstances.[520] Firstly, as stated above, no adequate steps were taken by the State to carry out the structural interdict set out by the court. Secondly, there was no intention to proceed with the structural interdict as granted by the court. Thirdly, the order could not be executed absent an agreement between the parties or a complex amendment to the order. In this regard, there had been little or no engagement regarding the relocation process as set out in the structural interdict. It was also unlikely that there would be any engagement concerning relocation in the future.[521] Fourthly, the order relates to thousands of people. Fifthly, the circumstances that motivated the court to grant the structural interdict in the first place had ceased to exist. Absent the relocation to the temporary accommodation units and engagement, the only part of the order that would remain is the bare, unconditional order requiring all the unlawful occupants to vacate the Joe Slovo area. It cannot be said to be just and equitable if such an order was to be left in place, particularly because the order has been in suspension for a long period of time.[522]

The court held that it was common cause that the most likely course for the redevelopment of the Joe Slovo settlement amounted to an *in situ* development. However, as pointed out by Pienaar, the court did not indicate how and when an *in situ* strategy became "common cause".[523] Due to the "new strategy" there was no intention to relocate the occupiers to temporary residential units, which meant that the timetable set out to effectively implement the supervised relocation order had become irrelevant. Overall, no adequate steps were taken by the State to carry out the supervised eviction order made by this court. The order has therefore for all intents and purposes been left in abeyance.[524] It was evident from these circumstances that the execution of the order would not have occurred within a reasonable time. The relocation process was scheduled to commence about two months after the order was

[520] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2011 7 BCLR (CC) paras 30-31.
[521] McLean (2010) *CCR* 223; Liebenberg *Socio-Economic Rights* 303-311.
[522] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2011 7 BCLR (CC) para 31.
[523] Pienaar *Land Reform* 779.
[524] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2011 7 BCLR (CC) para 37.

handed down and any agreement concerning amendments to the timetable was to be placed before the court less than a month after the date of its order.[525] The structural interdict did not contemplate the commencement of execution to exceed a year and a half after the order was made.[526] Therefore, implementation of the order cannot be said to have been executed within a reasonable time, which means that the structural interdict did not constitute effective relief.

Strictly speaking, the parties disregarded the order of the court in *Joe Slovo 1*. In principle this raises the question whether the parties should have been held in contempt of court. Raising contempt of court seems to be redundant in light of the fact that the parties obtained effective relief.[527]

Even though the structural interdict did not provide effective relief, it can be argued that the *in situ* development and the subsequent provision of adequate housing to the former Joe Slovo residents, constituted effective relief. The *in situ* development in this regard amounted to a realisation of the unlawful occupiers' rights under section 25(6) and section 26 of the Constitution. These actions also ensure that the State fulfils its constitutional obligations to provide housing on a progressive basis.[528]

The question arises as to whether the means to realise the rights of the unlawful occupiers could or would have been different had there been a private owner involved. Had the owner of the land in question been a private owner, instead of the State, the *in situ* upgrading of the informal settlement would not have been enough to constitute effective relief for the landowner and the unlawful occupiers respectively. Where there is a private owner involved, such as in *Modderklip HC*, the rights of the landowner will remain infringed for as long as the land is occupied by the unlawful occupiers. Depending on the nature and the extent of the infringement, alternative effective relief,

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[525] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2011 7 BCLR (CC) para 37.
[526] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2011 7 BCLR (CC) paras 37-38.
[527] Also note that the order was rescinded. See *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2011 7 BCLR (CC) in this regard.
[528] Section 26(2) of the Constitution of the Republic of South Africa, 1996. See Muller *The impact of section 26 of the Constitution* 82-93. Furthermore, see *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC); Liebenberg *Socio-Economic Rights* 344-351; McLean "Housing" in *CLOSA* 55-8-55-14 in general.

such as constitutional damages, may then be necessary to vindicate the private land owner's rights.[529]

Apart from issues pertaining to the complexity of the order granted in *Joe Slovo 1*,[530] one can only speculate whether the use of the structural interdict would have been effective if all the parties complied with the order granted by the court from the outset. The fact that the parties ignored the court order in *Joe Slovo 1* not only raises concern in terms of the rule of law principle, but it is also worrisome in light of the wasted legal costs and the time associated with obtaining a court order in the first place. Arguably, an *in situ* upgrading would have been a better approach and could have resulted in relief at a much earlier stage of litigation. In this regard, litigation costs and time could have been spared had the parties and court opted for an *in situ* upgrading from the outset. Arguably, the parties could have submitted a formulated plan for an *in situ* upgrading to the court at any time during the eviction process and the court could have retained jurisdiction over the case to ensure that progress in terms of the *in situ* development was effected.

4 4 Pheko v Ekurhuleni Metropolitan Municipality (No 1)

4 4 1 Introduction

More recently, the court in *Pheko v Ekurhuleni Metropolitan Municipality* ("Pheko 1")[531] ordered the municipality to file a report (confirmed on affidavit) regarding the steps that it proposed to take to identify land for the relocation of the applicants whose homes had been unlawfully demolished by the Municipality. The order gave the applicants 15 days to respond to the report.

4 4 2 Background and facts of the case

The Bapsfontein informal settlement is a well-established community, with no secure land tenure, which has resided informally on public land for more than a decade. The case of *Pheko 1* concerns the Ekurhuleni Municipality's efforts to remove residents

[529] Section 25(2) of the Constitution of the Republic of South Africa, 1996.
[530] See 4 3 4 1 in this regard.
[531] 2012 2 SA 598 (CC). A du Plessis & A van den Berg "Some perspectives on constitutional conflict in local disaster management through the lens of *Pheko v Ekurhuleni Metropolitan Municipality* 2012 2 SA 598 (CC): case note" (2013) 28 *SAPL* 448-468; G Muller "Evicting unlawful occupiers for health and safety reasons in post-apartheid South Africa" (2015) 132 *SALJ* 616-638.

from land it had deemed to be a "local state of disaster" pursuant to the Disaster Management Act 57 of 2002 ("DMA"), which was intended to provide municipalities with flexibility in urgently responding to disaster-stricken areas when such action is necessary for the preservation of life.[532]

The Municipality had commissioned a number of reports regarding the formation of sinkholes in the Bapsfontein area as early as 2004.[533] Having been aware of the development of sinkholes in the area since at least 2004, the Municipality finally declared Bapsfontein a disaster area in terms of the DMA in December 2010, after the report of 2009 concluded that the residents of the settlement should be evacuated and relocated to a safe area as the land was dolomitic.[534] Subsequently, the Municipality issued a notice[535] declaring Bapsfontein "a local state of disaster" due to the dolomite instability of the area in terms of the DMA, on 10 December 2010. Two months later, after declaring the land in question as unsafe, the Municipality issued a directive advising that all residents of the Bapsfontein Informal settlement were to be evacuated and relocated to temporary shelter for the preservation of life.[536] Because of the resistance to the relocation, the Municipality enlisted the services of the "Red-Ants"[537] to demolish the homes of the applicants on 5 March 2011.

Due to the impending removal and demolition of the residents' homes, the residents challenged the evacuation. An urgent interdict was sought to stop the forced removals and demolition of the residents' homes.[538] In the High Court, the residents sought

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[532] *Pheko v Ekurhuleni Metropolitan Municipality (No 1)* 2012 2 SA 598 (CC) para 1. See also Muller (2015) *SALJ* 616-638 where he determines which statute (the Disaster Management Act 57 of 2002, the National Building Regulations and Building Standards Act 103 of 1997 or the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998) should be used to evict unlawful occupiers for health and safety reasons in post-apartheid South Africa.

[533] *Pheko v Ekurhuleni Metropolitan Municipality (No 1)* 2012 2 SA 598 (CC) para 5.

[534] *Pheko v Ekurhuleni Metropolitan Municipality (No 1)* 2012 2 SA 598 (CC) paras 6-7.

[535] The notice read in relevant part: "Notice is hereby served in terms of the Disaster Management Act that the Bapsfontein Informal Settlement of 25 hectares, bordered by the R25 Provincial Road to the East and approximately 300 metres to the North of the R25 Provincial Road within the Ekurhuleni Metropolitan Municipal Area has been declared a Local Disaster Area in terms of section 55 of the Disaster Management Act due to dolomite instability. Further be advised that persons residing in the above mentioned area will be moved to a suitable alternative area as the current area in Bapsfontein they occupy is highly unstable and not safe for human settlement." This notice was published in part in the *Provincial Gazette Extraordinary* No 220 Local Authority Notice 1643, 10 December 2010.

[536] *Pheko v Ekurhuleni Metropolitan Municipality (No 1)* 2012 2 SA 598 (CC) para 11.

[537] The "Red-Ants" is a colloquial term for a private security company contracted by the South African government to help with evictions and forced removals. They wear red uniforms, hence their name "Red-Ants".

[538] *Pheko v Ekurhuleni Metropolitan Municipality (No 1)* 2012 2 SA 598 (CC) para 11.

urgent relief restraining the Municipality from demolishing their homes which would render them homeless, and from unlawfully evicting and intimidating them to vacate Bapsfontein without a court order. They also asked the court to order the Municipality to provide them with alternative accommodation.[539] The residents contended that the forcible eviction and demolition of their homes without an order of court not only violated their constitutional rights in relation to housing,[540] but also their right to have their dignity respected and protected.[541]

The High Court, however, found that the residents' removal from the land in question was lawful because the action was taken pursuant to the DMA provisions. Consequently, the High Court dismissed the application. An application to appeal directly to the Constitutional Court was subsequently launched by the residents. The key issue in *Pheko 1* was whether the removal of the unlawful occupiers amounted to an evacuation under the DMA, as contended by the Municipality.[542] The question of appropriate relief *in casu* is related to this.[543]

4 4 3 The judgment and order of the court

Upon finding that the evacuation of the unlawful occupiers in terms of the DMA amounted to an eviction without a court order, the Constitutional Court in *Pheko 1* set aside the order of the High Court.[544] The court provided two reasons for this decision.

First, the court found that the actions of the Municipality, in forcibly removing the residents of Bapsfontein Informal Settlement and demolishing their homes without a court order, allegedly as a result of the imminent danger created by sinkholes in the area, were unauthorised in law and contrary to section 26(3) of the Constitution which provides that "no one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions". In this regard, the Municipality relied on *City*

[539] *Pheko v Ekurhuleni Metropolitan Municipality (No 1)* 2012 2 SA 598 (CC) para 12.
[540] Section 26(3) of the Constitution of the Republic of South Africa, 1996. See in general Muller *The impact of section 26 of the Constitution* 93-99; Liebenberg *Socio-Economic Rights* 344-347.
[541] Section 10 of the Constitution provides: "Everyone has inherent dignity and the right to have their dignity respected and protected."
[542] For purposes of the thesis the determination of the issue whether section 55 of the Disaster Management Act 57 of 2002 authorises eviction and demolition without a court order is not important. Only the consequent order of the court is relevant.
[543] *Pheko v Ekurhuleni Metropolitan Municipality (No 1)* 2012 2 SA 598 (CC) para 24.
[544] *Pheko v Ekurhuleni Metropolitan Municipality (No 1)* 2012 2 SA 598 (CC) para 53.

of Johannesburg v Rand Properties (Pty) Ltd and Others (*Rand Properties*)[545] to justify the eviction of the occupiers without having complied with the relevant factors contemplated in section 26(3) of the Constitution.[546] The Municipality argued that section 26(3) contains two independent elements: a prohibition on evictions without court orders and a prohibition on legislation permitting arbitrary evictions. It argued that these elements had to be approached separately, meaning that legislation could permit evictions without court orders if doing so did not amount to an arbitrary eviction. The Municipality argued that the DMA constituted legislation that permitted "evacuations" to temporary shelters without a court order where a state of disaster was properly declared. The Municipality contended that an eviction in these circumstances was not "arbitrary," and was permitted by the DMA without a court order, consistent with the second sentence of section 26(3), as long as that provision was read disjunctively.[547] However, Nkabinde J, writing for an unanimous court, held that the interpretation advanced by the Municipality "turns section 26(3) on its head".[548] Section 26(3) must be read conjunctively, thereby prohibiting evictions from homes without court orders, even if authorised by statute.

Second, the Constitutional Court found that the residents' removal was not authorised by the DMA.[549] The DMA applies only when evacuation is necessary for the immediate preservation of life, which the court found was not the goal of the Municipality in evicting these residents.[550] The area had been labelled a hazardous area as early as 1986 and its first sinkhole appeared in 2004, yet evictions did not begin until 2010. Furthermore, the court found that the term "evacuation" does not contemplate eviction, but only covers temporary relocation. With regard to the Bapsfontein settlement the Municipality intended to permanently evict the residents. The court also found that the High Court did not sufficiently consider the relevant circumstances, such

[545] 2007 6 SA 417 (SCA). In this case the appellant relied on section 12(4)(b) of the National Building Regulations and Building Standards Act 103 of 1977 ("NBRA"). It sought the eviction of the respondents. The respondents resisted the evictions on the ground that the appellant had failed to follow the procedures prescribed by PIE and that the eviction would not be just and equitable. The Supreme Court of Appeal held that the occupiers were in an emergency situation and that fire and health hazards existed in the occupied buildings. It held further that the provisions under PIE did not apply in the context of that case (i.e. to the evacuation under the provisions of the NBRA).
[546] *Pheko v Ekurhuleni Metropolitan Municipality (No 1)* 2012 2 SA 598 (CC) para 21.
[547] *Pheko v Ekurhuleni Metropolitan Municipality (No 1)* 2012 2 SA 598 (CC) para 21.
[548] *Pheko v Ekurhuleni Metropolitan Municipality (No 1)* 2012 2 SA 598 (CC) para 35.
[549] *Pheko v Ekurhuleni Metropolitan Municipality (No 1)* 2012 2 SA 598 (CC) para 45.
[550] *Pheko v Ekurhuleni Metropolitan Municipality (No 1)* 2012 2 SA 598 (CC) para 39.

as whether alternative land could be made available to the residents and whether the disaster was sufficiently imminent as to warrant such a speedy relocation of the residents. Finally, the court issued an order requiring the Municipality to engage with the residents to identify settlement in the *immediate vicinity* of the land in question for relocation.[551]

As a point of departure in deciding on the appropriate remedy *in casu*, the court reiterated and cited the judgment in *Fose v Minister of Safety and Security*[552] which held that "[a]ppropriate relief will in essence be relief that is required to protect and enforce the Constitution".[553]

In this context the court declared the removal of the unlawful occupiers of Bapsfontein to be unlawful and held that the Municipality had an obligation to provide the unlawful occupiers with suitable temporary accommodation.[554] The fact that the land in question is owned by another State department does not absolve the Municipality from this obligation. This also includes the duty to identify and designate land for housing development for the residents of Bapsfontein. The court held that the unlawful occupiers are entitled to *effective* relief[555] and subsequently ordered the State to report to it about, amongst other things, whether land has been identified and designated to develop housing for the unlawful occupiers.[556]

The court found that the relief proposed by the unlawful occupiers (and to which the Municipality partly consented to in oral argument) in the relevant circumstances, subject to necessary modification, would constitute just and equitable relief and by definition, also effective relief for the parties.[557]

Consequently, the court issued a structural interdict which required the Municipality to identify land in the *immediate vicinity* of Bapsfontein for the relocation of the unlawful occupiers; to engage meaningfully with them on the identification of land and to subsequently file a report, confirmed on affidavit by no later than 1 December 2012

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[551] *Pheko v Ekurhuleni Metropolitan Municipality (No 1)* 2012 2 SA 598 (CC) para 43.
[552] 1997 7 BCLR 851 (CC) para 19.
[553] *Fose v Minister of Safety* 1997 7 BCLR 851 (CC) para 19 cited at *Pheko v Ekurhuleni Metropolitan Municipality (No 1)* 2012 2 SA 598 (CC) para 48.
[554] *Pheko v Ekurhuleni Metropolitan Municipality (No 1)* 2012 2 SA 598 (CC) para 49.
[555] *Pheko v Ekurhuleni Metropolitan Municipality (No 1)* 2012 2 SA 598 (CC) para 50.
[556] *Pheko v Ekurhuleni Metropolitan Municipality (No 1)* 2012 2 SA 598 (CC) para 50.
[557] *Pheko v Ekurhuleni Metropolitan Municipality (No 1)* 2012 2 SA 598 (CC) para 51.

regarding the steps it has taken in compliance with the court order to provide access to adequate housing for the unlawful occupiers.[558]

4 4 4 Evaluation of the order granted

4 4 4 1 Was it appropriate to grant a structural interdict?

It would seem that the only factor the court took into account in determining whether it was necessary to issue a structural interdict, was the uncertainty of knowing how long it will take the Municipality to identify relevant land. Although the contemplated delay in providing access to land and housing is important, it is not the only factor that has to be taken into consideration in determining whether the use of a structural interdict was necessary.[559]

Another factor which justifies the use of structural interdicts is the large number of people who would be adversely affected where housing is not provided for within a reasonable time.

In line with the other cases discussed above, the unlawful occupiers of Bapsfontein have the right to land; the right to access to adequate housing[560] and the right not to be evicted without a court order.[561] An eviction without a court order will lead to the violation of these rights. Moreover, a failure by the State to provide alternative accommodation, where it is a condition of an eviction order, will also violate the section 26 rights of the unlawful occupiers. In these circumstances it became clear that the State intended to "evacuate" the unlawful occupiers from the land in terms of the DMA rather than to "evict" them under PIE.

It is conceivable that the intention of the State to circumvent the provisions of PIE, by relying on the provisions of the DMA, can be linked to bad faith. In this light it is questionable whether the State will comply timeously with the eviction and relocation order handed down in *Pheko 1*.[562] The State's conduct indicates a certain lack of appreciation for its constitutional obligations in terms of section 26(3) of the

[558] *Pheko v Ekurhuleni Metropolitan Municipality (No 1)* 2012 2 SA 598 (CC) para 53.
[559] Roach & Budlender (2005) *SALJ* 333.
[560] Section 26(1) of the Constitution of the Republic of South Africa, 1996.
[561] Section 26(3) of the Constitution of the Republic of South Africa, 1996.
[562] Roach & Budlender (2005) *SALJ* 333.

Constitution. State departments and officials cannot be allowed to operate outside the ambit of the law. Therefore, supervision is necessary to ensure that the State complies with all of its constitutional duties,[563] so that the State acts within the ambit of their authority.[564]

4 4 4 2 Did the structural interdict provide effective relief?

Where litigants obtain a court order vindicating their right but there is a failure to execute the order it cannot be said that the rights violations have been effectively remedied.

Following the continuous failure by the State to execute the order obtained in *Pheko 1*, the unlawful occupiers instituted further action. In the subsequent case of *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* ("Pheko 2"),[565] it was found that the State repeatedly failed to comply with the previous order (i.e. the structural interdict issued in *Pheko 1*). Consequently, the Constitutional Court in *Pheko 2* opted for alternative effective relief in the form of contempt of court proceedings, to remedy the failed execution of the structural interdict ordered in *Pheko 1*.[566]

Although contempt of court could not be proven, it did not detract from the fact that the State had been in breach of their constitutional[567] and statutory obligations.[568] The court found that these obligations continue to form part of the State's ongoing responsibility to provide the unlawful occupiers of Bapsfontein with land and adequate housing.[569] Accordingly, for the purpose of implementing the court's supervisory order in *Pheko 1*, and in light of the constitutional and statutory obligations of the relevant State officials, the court ordered that the Executive Mayor, Municipal Manager and Head of the Department for Human Settlements as well as the Member of the

[563] Section 26(1) of the Constitution of the Republic of South Africa, 1996.
[564] Section 26(3) of the Constitution of the Republic of South Africa, 1996 read with the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998; Wilson (2009) *SALJ* 270-290; Pienaar & Mostert (2006) *TSAR* 522-536.
[565] 2015 6 BCLR 711 (CC). See in general Muller (2015) *SALJ* 616-638.
[566] For a detailed discussion on contempt of court proceedings as a potential form of alternative effective relief, where the structural interdict does not provide such relief see Chapter 4 where *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* 2015 6 BCLR 711 (CC) is discussed and analysed in detail.
[567] Sections 152; 26 and 165(4) of the Constitution of the Republic of South Africa, 1996; *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* 2015 6 BCLR 711 (CC) para 44.
[568] Section 73 of the Local Government: Municipal Systems Act 32 of 2000, read with section 9(1) of the Housing Act 107 of 1997.
[569] *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* 2015 6 BCLR 711 (CC) para 46 read with the order in *Pheko v Ekurhuleni Metropolitan Municipality (No 1)* 2012 2 SA 598 (CC) para 49-50.

Executive Council for Gauteng Department for Human Settlements,[570] be joined to the proceedings.[571]

Following the *Pheko 1* and *Pheko 2* orders, several expert reports and affidavits regarding the identification of land in the immediate vicinity of Bapsfontein for the relocation of the unlawful occupiers have been filed by the parties.[572] On examination of the reports the problem appears to be this: The Municipality has identified three viable portions of land for the relocation of the unlawful occupiers as required by the order in *Pheko 1*. This land is approximately 20 to 30 km away from the Bapsfontein settlement. The unlawful occupiers assert that the parcels of land are not within the *immediate vicinity* of Bapsfontein. Accordingly, they view the assertion by the Municipality that it is impossible to identify viable land in the immediate vicinity of Bapsfontein as a refusal to comply with the order in *Pheko 1*.[573] Accordingly, in light of the difficulties associated with the execution of the structural interdict granted in *Pheko 1*, the Constitutional Court in *Pheko v Ekurhuleni Metropolitan Municipality (No 3)* ("Pheko 3")[574] had to determine whether to discharge its supervisory jurisdiction and whether the matter should be referred to the High Court.[575]

Due to the factual disputes that emerged from the expert reports regarding viable relocation options,[576] the parties agreed that the matter should be referred to the High Court.[577] Accordingly, the Constitutional Court discharged the order in *Pheko 1*, but transferred the matter to the High Court.[578] Furthermore, the court in *Pheko 3* held that the High Court will have the authority to determine issues relating to the identification

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[570] Together, these State officials are responsible for the execution of eviction orders. It is precisely because of the leadership entrusted to these State officials that they have a duty to undertake responsibility by implementing court orders. See Chapter 4, 3 1 3 in this regard.
[571] *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* 2015 6 BCLR 711 (CC) paras 58-60.
[572] *Pheko v Ekurhuleni Metropolitan Municipality (No 3)* (CCT 19/11) [2016] ZACC 20 (26 July 2016) para 19.
[573] *Pheko v Ekurhuleni Metropolitan Municipality (No 3)* (CCT 19/11) [2016] ZACC 20 (26 July 2016) para 20.
[574] (CCT 19/11) [2016] ZACC 20 (26 July 2016).
[575] *Pheko v Ekurhuleni Metropolitan Municipality (No 3)* (CCT 19/11) [2016] ZACC 20 (26 July 2016) para 22. Interestingly, the State opposed the application for the court to discharge the structural interdict. The State's reasoning for this is based on the complexity and practical difficulties associated with implementing the structural interdict in *Pheko 1*.
[576] *Pheko v Ekurhuleni Metropolitan Municipality (No 3)* (CCT 19/11) [2016] ZACC 20 (26 July 2016) para 14.
[577] *Pheko v Ekurhuleni Metropolitan Municipality (No 3)* (CCT 19/11) [2016] ZACC 20 (26 July 2016) paras 34 and 37.
[578] *Pheko v Ekurhuleni Metropolitan Municipality (No 3)* (CCT 19/11) [2016] ZACC 20 (26 July 2016) para 46.

of suitable alternative land in the *vicinity*[579] of Bapsfontein for the unlawful occupiers. In this regard, the High Court will also supervise the relocation of the unlawful occupiers.[580]

In this regard, Nkabinde J notes that:

> "Supervisory orders arising from structural interdicts ensure that courts play an active monitoring role in the enforcement of orders…By granting the structural interdict a court secures a response in the form of reports and thereby prevents a failure to comply with the positive obligations imposed by its order. Generally, the court's role continues until the remedy it has ordered in a matter has been fulfilled".[581]

Although the rights of the unlawful occupiers still remain *in limbo*, it seems as if the State is working progressively and within its budgetary constraints to provide land and adequate housing to them. In this regard, effective relief may not yet have been realised, but it a step in the right direction. In this regard, the *Pheko* cases illustrate that a combination of remedies and the court's continuous supervision, coupled with the participation of the responsible State officials, may potentially or ultimately ensure the realisation of effective relief over time.

4 5 Occupiers of 51 Olivia Road v City of Johannesburg

4 5 1 Introduction

The *Occupiers of 51 Olivia Road v City of Johannesburg* ("Olivia Road")[582] case has highlighted the benefits which could be derived from issuing structural interdicts [583] *before* granting eviction orders.

Strictly speaking, this case falls outside the focus of this thesis, because the court in *Olivia Road* never granted an eviction order.[584] Although the court did not grant an eviction order, eviction proceedings where instituted nevertheless. Arguably, an

[579] Note that the word "immediate", as used by the court in *Pheko 1*, has been omitted.
[580] *Pheko v Ekurhuleni Metropolitan Municipality (No 3)* (CCT 19/11) [2016] ZACC 20 (26 July 2016) para 46.
[581] *Pheko v Ekurhuleni Metropolitan Municipality (No 3)* (CCT 19/11) [2016] ZACC 20 (26 July 2016) para 1.
[582] 2008 3 SA 208 (CC). See in general Ray (2008) *HRLR* 703-713; Chenwi & Liebenberg (2008) *ESR Review* 12-17; Chenwi (2009) *CCR* 371-393; Chenwi (2011) *SAPL* 128-156; Muller (2011) *Stell LR* 742-758; Liebenberg (2012) *AHRLJ* 1-29; Liebenberg *Socio-Economic Rights* 293-303.
[583] Mbazira *Litigating socio-economic rights* 210; Liebenberg *Socio-Economic Rights* 293-303.
[584] This thesis assumes that an eviction order has been granted. See Chapter 1 at 6.

eviction order would have been inevitable had the court not issued a structural interdict - or an *interim* structural interdict to be more specific. While the case, strictly speaking, may not fall within the scope of this thesis, the remedy does. Ultimately, this thesis explores whether the remedies discussed may provide effective relief to those involved in the eviction process. It may be helpful and insightful to identify the elements of the structural interdict in *Olivia Road* which led to the realisation of the parties' rights. The structural interdict used in *Olivia Road* highlights that issuing a structural interdict *before* considering and awarding an eviction order in terms of PIE may provide effective relief. For these reasons, the case is accordingly discussed.

4 5 2 Background and facts of the case

In 2003 the State embarked upon an ambitious regeneration programme in the inner city of South Africa's biggest metropolitan municipality, Johannesburg Municipality, premised entirely on encouraging commercial property developers to take control of urban slum properties; evict the occupiers there from and refurbish them for occupation at much higher rents.[585] Approximately 10 000 people were evicted by the City under the auspices of this strategy. [586]

In *Olivia Road* the City of Johannesburg sought to evict approximately 400 people from six buildings situated in the inner city of Johannesburg. [587] Rather than rely on the PIE, with its injunction to consider the equity of eviction from homes, the City elected instead to rely on the National Building Standards and Building Regulations Act 103 of 1977 ("NBRA"). This enabled the City to circumvent a number of the supposedly onerous provisions set out in PIE. Section 12(4)(b) of the NBRA permitted a municipal official, if she was of the opinion that it was necessary "for the safety of any person" to order the "vacation" of a property, merely by issuing a notice to that effect. The use of the NBRA in this way assisted the City to characterize the slum properties in the inner city as health and safety nuisances rather than housing sites in dire need for urgent attention.

[585] Liebenberg *Socio-Economic Rights* 293-303; S Wilson "Litigating Housing Rights in Johannesburg's Inner City: 2004-2008" (2010) 27 *SAJHR* 134 134.
[586] Wilson (2010) *SAJHR* 137.
[587] Muller *The impact of section 26 of the Constitution* 257; Mbazira (2008) *SAJHR* 17; Mbazira *Litigating socio-economic rights* 210; Liebenberg *Socio-Economic Rights* 293-303.

The High Court dismissed the eviction application on the basis that the City had failed to adopt a policy through which the occupiers could access affordable alternative accommodation.[588] The High Court declared that the City's strategy fell short of the requirement to provide suitable relief for the people in the City who were in crisis or in desperate need of housing and found that the absence of such a policy was in breach of the City's constitutional obligations.[589] Consequently, the court interdicted the City from evicting the occupiers until alternative accommodation was made available.[590]

On appeal to the Supreme Court of Appeal, Harms JA in *City of Johannesburg v Rand Properties*[591] set aside most of the High Court's order, holding that the City's right to seek the "evacuation" of buildings it considered unsafe was not conditional on it being able to provide alternative accommodation.[592] The eviction order was consequently reinstated.[593] Nonetheless, Harms JA ordered that alternative accommodation, in the form of temporary shelter, be provided for those in desperate need of housing. He accordingly directed the City to open a register upon which the occupiers could register themselves for the provision of emergency accommodation once they were evicted.[594] Fearing that they would be left homeless while the City compiled its register and identified emergency accommodation, the occupiers applied for leave to appeal to the Constitutional Court.

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[588] *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 1 SA 78 (W); C Mbazira "An overview of the Constitutional Court hearing of inner-city evictions case: Case review 1" (2007) 8 *ESR Review* 12-16; Strydom & Viljoen (2014) *PELJ* 1224-1225; S Wilson "A new dimension to the right to housing: case review" (2006) 7 *ESR Review* 9-13.

[589] *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 1 SA 78 (W) paras 65-67; Mbazira (2007) *ESR Review* 12-16; Strydom & Viljoen (Maass) (2014) *PELJ* 1224-1225; Wilson (2006) *ESR Review* 9-13.

[590] *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 1 SA 78 (W) para 67; Mbazira (2007) *ESR Review* 12-16; Strydom & Viljoen (Maass) (2014) *PELJ* 1224-1225; Wilson (2006) *ESR Review* 9-13.

[591] 2007 6 SA 417 (SCA); Mbazira (2007) *ESR Review* 12-16; Strydom & Viljoen (Maass) (2014) *PELJ* 1224-1225; Wilson (2006) *ESR Review* 9-13.

[592] *City of Johannesburg v Rand Properties* 2007 6 SA 417 (SCA) paras 68-69; Mbazira (2007) *ESR Review* 12-16; Strydom & Viljoen (Maass) (2014) *PELJ* 1224-1225; Wilson (2006) *ESR Review* 9-13.

[593] *City of Johannesburg v Rand Properties* 2007 6 SA 417 (SCA) para 78; Mbazira (2008) *SAJHR* 18; Mbazira (2007) *ESR Review* 12-16; Strydom & Viljoen (Maass) (2014) *PELJ* 1224-1225; Wilson (2006) *ESR Review* 9-13.

[594] *City of Johannesburg v Rand Properties* 2007 6 SA 417 (SCA) para 78; Mbazira (2008) *SAJHR* 18; Mbazira (2007) *ESR Review* 12-16; Strydom & Viljoen (Maass) (2014) *PELJ* 1224-1225; Wilson (2006) *ESR Review* 9-13.

4 5 3 The judgment and order of the court

The Constitutional Court introduced a new approach to the structural interdict which promoted dialogue among the parties. Inevitably this may result in the execution of court orders where the degree of involvement by the court, by way of supervision, is minimised.[595] Reluctant to delve into the deeper questions of whether the City had an obligation to adopt a policy in terms of which the occupiers should be afforded alternative accommodation, the Constitutional Court instead focussed on the absence of "meaningful engagement" with the occupiers prior to eviction.[596] During the course of the hearing, the court ordered what can be described as an interim structural interdict.[597] The court directed that the parties engage with each other meaningfully in an effort to resolve the differences and difficulties aired in the eviction application, having regard to the constitutional and statutory obligations of the municipality and the rights and duties of the unlawful occupiers concerned[598] and to report back at a later date regarding these deliberations. It was required of parties to submit affidavits to the court, within 2 months, which reported on the results reached between the unlawful occupiers and the State.[599]

The court held that:

> "[T]he City has shown a willingness to engage. As a result, the desperate situation of the occupiers has been alleviated by the reasonable response of the City to the engagement process. There is no reason to think that future engagement will not be meaningful and will not lead to a reasonable result. In any event this court should not be the court of first and last instance on whether the City has acted reasonably in the process. Nor should it be the only determinant of whether the plan is reasonable in the sense of being sufficiently concrete and clear. It is the duty of both parties to continue

[595] Mbazira (2008) *SAJHR* 19.
[596] Liebenberg *Socio-Economic Rights* (2010) 293-303. 419; Ray (2008) *HRLR* 703-713; Chenwi & Liebenberg (2008) *ESR Review* 12-17; Chenwi (2009) *CCR* 371-393; Chenwi (2011) *SAPL* 128-156; Muller (2011) 22 *Stell LR* 742-758; Liebenberg (2012) *AHRLJ* 1-29.
[597] Mbazira (2008) *SAJHR* 18.
[598] *Occupiers of 51 Olivia Road v City of Johannesburg* 2008 3 SA 208 (CC) para 5; Ray (2008) *HRLR* 703-713; Chenwi & Liebenberg (2008) *ESR Review* 12-17; Chenwi (2009) *CCR* 371-393; Chenwi (2011) *SAPL* 128-156; Muller (2011) 22 *Stell LR* 742-758; Liebenberg (2012) *AHRLJ* 1-29.
[599] *Occupiers of 51 Olivia Road v City of Johannesburg* 2008 3 SA 208 (CC) para 5; Mbazira (2008) *SAJHR* 18; Liebenberg *Socio-Economic Rights* 293-303, 419.

> with the process of negotiation and for the occupiers of the City to approach the High Court if this course becomes necessary".[600]

After two months of intensive negotiations which were effectively overseen by the Constitutional Court, the matter was finally resolved with the occupiers being offered and accepting accommodation in a building yet to be refurbished nearby in the inner city where the residents remain today.[601]

4 5 4 Evaluation of the order granted

4 5 4 1 Was it appropriate to grant a structural interdict?

Where an eviction order is granted, but there is no alternative accommodation available upon executing the eviction order, the unlawful occupiers' constitutional right to have access to adequate housing will be infringed.[602]

Where a delay in the provision of housing to those in desperate need thereof is likely to increase the harm or discomfort suffered, the use of the structural interdict will be necessary to avoid such a delay.[603] At the institution of proceedings in the Constitutional Court there had been no fundamental breach of the unlawful occupiers' right to be provided with temporary emergency housing, though a fear existed that such accommodation would not be provided timeously. The court attributed this fear to the fact that there had been no meaningful engagement between the parties.[604] Arguably, the lack of meaningful engagement was indicative thereof that the State would not comply with its constitutional duties in a timeous manner,[605] which necessitated the use of the structural interdict.

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[600] *Occupiers of 51 Olivia Road v City of Johannesburg* 2008 3 SA 208 (CC) para 34.
[601] Liebenberg *Socio-Economic Rights* 293-303, 419.
[602] Strydom & Viljoen (Maass) (2014) *PELJ* 1207; Swart (2005) *SAJHR* 217. See in general Van der Walt *Constitutional Property Law* 17-18 and Roux "Property" in *CLOSA* 41-1-41-37; Pienaar *Land Reform* 378-509 and Pienaar & Brickhill "Land" in *CLOSA* 48-25-48-52; *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC); Liebenberg *Socio-Economic Rights* 344-351; Muller *The impact of section 26 of the Constitution* 75-82 and McLean "Housing" in *CLOSA* 55-8-55-14. Furthermore, see *Fose v Minister of Safety and Security* 1997 7 BCLR (CC) para 69; Bishop "Remedies" in *CLOSA* 9-65-9-78; Mbazira *Strategies for effective implementation* 5.
[603] Liebenberg *Socio-Economic Rights* 293-303, 419.
[604] *Occupiers of 51 Olivia Road v City of Johannesburg* 2008 3 SA 208 (CC) paras 22 and 35.
[605] Roach & Budlender (2005) *SALJ* 333 and 350.

Other factors, such as the practical concerns regarding the provision of temporary and suitable housing to approximately 400 people[606] were also indicative thereof that the use of the (interim) structural interdict was appropriate and necessary, given the circumstances of the case.

4 5 4 2 Did the structural interdict provide effective relief?

The fact that the court issued an interim structural interdict before determining whether to grant an eviction order, led to an outcome that constituted effective relief for all parties. Liebenberg states that the case illustrates how a mandatory structural interdict ordered by a court instructing the parties to engage meaningfully with each other before an eviction order is granted can stimulate a dialogic process of engagement leading to the provision of concrete benefits to a particular group.[607]

Again, the question arises as to how effective the engagement process would have been and whether the rights of all the parties would have been realised if the private land owner instituted eviction proceedings as opposed to the State. Depending on the nature and extent of the deprivation, compensation of some kind would arguably have been necessary to vindicate the land owner's property rights. This matter is dealt with further in Chapter 3 below.

5 Reflection

A comparison between *Olivia Road* and the abovementioned cases may provide insight regarding the successful use of the structural interdict in eviction cases. Active participation by all parties and the stage at which the structural interdict is utilised can be identified as factors that will ensure the successful and effective use of the structural interdict in eviction cases. The effective use of the structural interdict during the procedural and/or execution phase[608] plays a central role in the realisation of constitutional rights and the provision of effective relief accordingly.

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[606] Roach & Budlender (2005) *SALJ* 333.
[607] Liebenberg *Socio-Economic Rights* 420; See also K Tissington "Challenging inner city evictions before the Constitutional Court of South Africa: the *Occupiers of 51 Olivia Road* case in Johannesburg, South Africa" (2008) 5 *Housing and ESC Rights Law Quarterly* 1; Ling (2015) *HKJLS* 60; Lawrence *The impact of supervisory orders and structural interdicts* 44-45.
[608] See Chapter 1 above at 1.

Where there is a willingness on the part of all the parties to engage meaningfully and in good faith with each other in order to reach effective relief, the possibility of achieving such relief should, in theory, be possible.[609] In this regard, *Olivia Road* illustrates that participation by all parties is key for achieving effective relief.[610]

By comparison, in *Modderklip HC*, the lack of participation by the State to execute the eviction order and abide by the structural interdict resulted in the ineffective use thereof. Although the State consented to the relief proposed by the unlawful occupiers in *Pheko 1*, it failed to engage meaningfully with the residents regarding the identification of land. In *Joe Slovo 1* the court requested that the parties engage meaningfully with one another regarding when and how the relocation of the unlawful occupiers would take place. Although the parties engaged actively with one another, the parties completely ignored the scope and objectives of the structural interdict. Instead, the reports questioned whether the relocation process should take place at all.[611] It became abundantly clear from reports submitted after the *Joe Slovo 1* judgement was handed down, that the parties favoured an *in situ* upgrading. Arguably, the court should have left the formulation of a remedial plan to the parties from the outset, but with some oversight by the court. In this regard, the court could have issued a structural interdict requiring the parties to engage meaningfully with one another on finding a suitable remedy, linked to a particular time line.

The precise stage when a structural interdict is issued may also be indicative of whether the use thereof will constitute effective relief. In *Olivia Road* the structural interdict was ordered *before* an eviction order was granted and implemented. The court in *Modderklip HC, Joe Slovo 1* and *Pheko 1* issued a structural interdict only *after* an eviction order was granted.

[609] Muller *The impact of section 26 of the Constitution* 261; *Residents of Joe Slovo Community, Western Cape v Thubelisa Homes* 2010 3 SA 454 (CC) para 244; Ling (2015) *HKJLS* 60.
[610] Mbazira (2008) *SAJHR* 21-23; Lawrence *The impact of supervisory orders and structural interdicts* 44-48
[611] Lawrence *The impact of supervisory orders and structural interdicts* 47 and 49-52 where she states that *Joe Slovo* is a good illustration of how meaningful engagement should not take place. See also Mclean (2010) *CCR* 232; Liebenberg (2012) *AHRLJ* in general.

6 Conclusion

From the exposition above, it is clear that constitutional rights require remedies. Indeed, in accordance with a remedy-based approach "a right without a[n effective] remedy is not a legal right; it is merely a hope or a wish".[612] The courts should be guided by this fundamental, but often forgotten, constitutional principle. This is especially pertinent when State officials fail to execute court orders in a reasonable and timely manner.[613] In reality, the road to achieving compliance with such an order is invariably impacted on by delay or failure by State officials to uphold their constitutional obligations.[614]

If there is disregard of court orders, such as in the cases of *Modderklip HC*, *Joe Slovo* and *Pheko 1*, judicial action taken to achieve effective relief within a reasonable time in the form of a structural interdict will constitute an appropriate exercise of judicial power.

A discussion of the use of the structural interdict by the South African courts in eviction case law has shown that the structural interdict may provide effective relief to the parties in principle. However, it is not likely to do so where the State is not willing to engage with and fulfil their constitutional obligations. The judgments above indicate that the common denominator for the successful use of the structural interdict in providing effective relief is when active State participation is present. State participation is determined by and impacted on by various factors, including capacity, available resources, budgetary considerations, good governance and sustainability. It is also necessary to ensure that communication channels are open and that the court and the parties involved in the eviction process have a clear and collective objective in mind. A common objective between the court and the parties and an agreement on the steps to achieve effective relief may help avoid situations such as the outcome in

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612 Ziegler (1987) *Hastings Law LJ* 678; *Fose v Minister of Safety and Security* 1997 7 BCLR (CC) para 69.

613 Grossenbacher (1991-1992) *Georgetown LJ* 2257-2258.

614 See *City of Johannesburg Metropolitan Municipality v Hlophe* 2015 2 All SA 251 (SCA); *Modderfontein East Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2004 6 SA 40 (SCA) and *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) as examples of continuous failures by the State to realise housing rights.

the *Joe Slovo 1* case.[615] The particular disposition of the relevant State official or officials within a particular State department may also emerge at this point, ultimately impacting negatively on active participation. Peculiarly, the very circumstance that triggers the employ of a structural interdict is also the determining factor linked to the successful implementation thereof.

As is evident from the successful use of the interdict in *Olivia Road*, the structural interdict has the potential to provide effective relief. Despite this potential, in most cases a structural interdict may not result in effective relief without close supervision by and scrutiny of the court, coupled with the willingness of the parties to engage meaningfully with one another and the State's fulfilment of its constitutional duties.

Where this is not the case, the right to a remedy does not simply wither away. Parties are still entitled to effective relief regardless of whether the use of the structural interdict was successful or not.

It is within this context that other possible alternative remedies emerge. Such alternative effective relief constitutes various forms, including constitutional damages[616] and contempt of court orders,[617] discussed in more detail below.

[615] From the outset of the case the parties and the court were at cross-purposes. The parties (the unlawful occupiers and the State) opted for *in situ* upgrading of the settlement, whereas the court issued a relocation order that amounted to an eviction. See 4 3 above where the case is analysed in detail.
[616] See Chapter 3.
[617] See Chapter 4.

Chapter 3: Constiutional Damages

Table of contents

1 Introduction

Chapter 2 set out to explore whether the use of a structural interdict may provide effective relief. In theory, a structural interdict appears to be the ideal solution where there has been a failure to execute an eviction order. However, case law has illustrated that it may not always be true. The structural interdict is often not an ideal solution because of a lack of willingness on the part of the parties to engage meaningfully and in good faith with each other and/or due to inattentiveness, incompetence or intransigence on the part of the State generally or at different levels of government. Accordingly the rights violations remain unaddressed and the need for effective relief continuous to exist. In the context of evictions, this means that the rights of the land owner and the unlawful occupiers remain *in limbo*. Accordingly, where the use of the structural interdict would not be appropriate given the circumstances of the case or where the use thereof has proven to be ineffective, alternative effective relief must be explored in order to redress the rights violation.[618] One option available is the payment of indirect or direct constitutional damages, which forms the focus of Chapter 3.

Compensation in the form of indirect or direct constitutional damages may be regarded as an effective remedy for the infringement of a right.[619] Indirect or direct constitutional damages not only reimburse the person who has suffered a loss, but it also highlights and emphasises State accountability to an extent.[620] Whereas indirect constitutional damages have been utilised in a number of cases in the South African context,[621] the

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[618] M Bishop "Remedies" in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (RS 6 2014) 9-65-9-78. See also *Fose v Minister of Safety and Security* 1997 7 BCLR (CC) para 69; C Mbazira *Strategies for effective implementation of court orders in South Africa*: *You are the "weakest link" in realising socio-economic right: Goodbye* (2008) 5. See Chapter 1 at 2 3 and Chapter 2 in general.

[619] M Loubser, R Midgley, A Mukheibir, L Niesing, D Perumal *The Law of Delict in South Africa* 2ed (2012) 4, 8; I Currie & J de Waal *The Bill of Rights Handbook* 6 ed (2013) 200-201 where the authors provide reasons why damages is a necessary remedy.

[620] RJ de Beer & S Vettori "The Enforcement of Socio-Economic Rights" (2007) 10 *PELJ* 17. Constitutional damages only contribute to State accountability to a certain extent. While it may be the State who is held accountable by a court, it is the taxpayer who effectively pays the damages awarded. See BL Batchelor *Constitutional Damages for the Infringements of a Social Assistance Right in South Africa: Are monetary damages in the form of interest a just and equitable remedy for the breach of a social right?* LLM University of Fort Hare (2011) 128.

[621] See for example, *M v Minister of Police of the Government of the Republic of South Africa* 2013 5 SA 622 (GNP); *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC); *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA); *Van Eeden v Minister of Safety and Security* 2003 1 SA 389 (SCA); *Zealand v Minister for Justice and Constitutional Development* 2008 4 SA 458 (CC).

courts have seldom granted direct constitutional damages to remedy a constitutional right infringement,[622] let alone in the context of eviction cases.[623]

Chapter 3 begins with a discussion of indirect and direct constitutional damages, in light of the single-system-of-law concept and subsidiarity principles, respectively. In terms of the discussion of indirect constitutional damages, it is questioned whether a statute or the common law may provide effective relief to a land owner and unlawful occupiers. Having established that indirect constitutional damages may not always provide or constitute effective relief, the use of direct constitutional damages is explored. Absent an overarching framework for determining whether direct constitutional damages may be appropriate in a particular eviction case in South Africa, the study sets out to discuss the four step framework established in Canadian case law.

Absent a statutory mechanism,[624] common law remedy or general framework for granting constitutional damages[625] it seems that, in general, constitutional damages will only be awarded where no other form of relief constitutes appropriate and effective relief.[626] In this regard, *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* ("Modderklip CC")[627] is discussed and analysed. *Modderklip CC* serves as an example where constitutional damages constituted the only appropriate relief given the circumstances of the case.[628] However, it is questioned whether the

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[622] S Liebenberg *Socio-Economic Rights: Adjudication under a transformative Constitution* (2010) 439, 442 identifies two primary areas where direct constitutional damages have been awarded in the context of socio-economic rights cases: To reconcile the protection of property and housing rights and to compensate for the maladministration of social grants; Currie & De Waal *The Bill of Rights* 201.

[623] *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC). See in general A Christmas "The *Modderklip* case: the state's obligations in evictions instituted by private landowners: case review" (2005) 4 *ESR Review* 6-10; S Khoza "Questioning the wisdom of moving 40 000 people: the Modderklip saga continues: case review" (2005) 6 *ESR Review* 10-11; AJ van der Walt "The state's duty to protect property owners v the State's duty to provide housing: Thoughts on *Modderklip* case: notes and comments" (2005) 21 *SAJHR* 144-161.

[624] M Kruger "Arbitrary deprivation of property: An argument for the payment of compensation by the state in certain cases of unlawful occupation" (2014) 131 *SALJ* 329. See in general AJ van der Walt *Property and Constitution* (2012) 81-91; J Strydom *A hundred years of demolition orders: A constitutional analysis* LLD Stellenbosch University (2012) 362.

[625] S Barns "Constitutional Damages: A call for the development of a framework in South Africa" (2013) *Responsa Meridiana* 22. See also 3 below.

[626] Currie & De Waal *The Bill of Rights* 201; Strydom *A hundred years of demolition orders* 351-352. See also *Fose v Minister of Safety and Security* 1997 7 BCLR (CC) para 69; Bishop "Remedies" in *CLOSA* 9-65-78; Mbazira *Strategies for effective implementation* 5.

[627] 2005 5 SA 3 (CC). See in general Christmas (2005) *ESR Review* 6-10; Khoza (2005) *ESR Review* 10-11; Van der Walt (2005) *SAJHR* 144-161.

[628] See 4 2 below.

relief provided actually constituted effective relief. In this regard alternative forms of relief, such as expropriation, *Ausgleich* (known as equalisation measures in German law)[629] and sharing (a concept found in American property law),[630] are explored in order to find an outcome that may constitute effective relief.

Thereafter, and by way of comparison, *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* ("Blue Moonlight SCA")[631] illustrates when constitutional damages will *not* be regarded as appropriate relief.

In light of the developments set out in Chapter 2 regarding the often ineffective use of structural interdicts, coupled with the absence of direct constitutional damages in the context of evictions, glaring shortcomings emerge. By way of reflection, Chapter 3 concludes and finds that it is pertinent that no compensatory provision prevails in its current formulation of PIE. Accordingly, either an amendment to PIE, by way of providing for an equalisation measure,[632] or a general framework for direct constitutional damages stands to be developed.[633] The latter will potentially increase the use of constitutional damages as a remedy to vindicate fundamental rights and deter future infringements.[634]

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[629] AJ van der Walt *Constitutional Property Law* 3 ed (2011) 366-367 and 277-280; Strydom *A hundred years of demolition orders* 350.
[630] R Dyal-Chand "Sharing the Cathedral" (2013) 46 *Connecticut LR* 647-723 647.
[631] 2011 4 SA 337 (SCA). See in general K Tissington & S Wilson "SCA upholds rights of urban poor in *Blue Moonlight* judgment: case review" (2011) 12 *ESR Review* 3-6; GS Dickinson "Blue Moonlight Rising: evictions, alternative accommodation and a comparative perspective on affordable housing solutions in Johannesburg" (2011) 27 *SAJHR* 466-495; H Kruuse "The art of the possible in realising socio-economic rights: the SCA decision in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties (Pty) Ltd: notes*" (2011) 128 *SALJ* 620-632; and GS Dickinson "The *Blue Moonlight* remedy: formulating the voucher scheme into a new emergency housing remedy in South Africa" (2013) 130 *SALJ* 554-596.
[632] Strydom *A hundred years of demolition orders* 351-352; Van der Walt *Constitutional Property Law* 366-367 and 277-280.
[633] *Vancouver (City) v Ward* 2010 2 SCR 28 SCC. This case has provided Canada with an authoritative interpretation of "appropriate and just relief" in section 24(1) of the Charter in respect of constitutional damages. See also C Okpaluba "The development of Charter Damages Jurisprudence in Canada: Guidelines from the Supreme Court" (2012) 55 *Stell LR* 55-75 55-56; CDL Hunt "Case Note: Constitutional Damages in the Supreme Court of Canada" (2011) 115 *Cambridge Student LR* 115-120 115. See 3 below and Chapter 5 at 3 5 3.
[634] See in general Barns (2013) *Responsa Meridiana* 1-22.

2 Indirect and direct constitutional damages

2 1 Introduction

Constitutional damages can be regarded as a remedy available for the violation of an individual's constitutional rights.[635] Whether a court should award constitutional damages in general, should be determined on the facts of each case, for what is ultimately at stake is the effective vindication of a constitutional right.

Bishop identifies two broad types of damages in constitutional matters: Indirect constitutional damages[636] and direct constitutional damages.[637] According to Bishop, indirect constitutional damages constitute damages that are awarded in terms of a statute or the common law that gives effect to a constitutional right,[638] whereas direct constitutional damages flows directly from the Constitution.[639]

Whether indirect or direct constitutional damages are applicable to a set of facts should be determined in accordance with the single-system-of-law concept[640] and subsidiarity principles.[641] Where a litigant seeks to vindicate the infringement of a constitutionally protected right, that person must rely on the legislation enacted to protect that right and may not rely on the common law or on the constitutional provision directly.[642] Accordingly, if PIE provided for a compensatory remedy to address instances where there is a disproportionate and continued violation of the land owner's property rights, then the land owner instituting a claim for the eviction of the unlawful occupiers, would

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635 Bishop "Remedies" in *CLOSA* 9-150; Loubser *et al The Law of Delict* 33-35.
636 See 2 2 below.
637 See 2 3 below. See also Bishop "Remedies" in *CLOSA* 9-151; Loubser *et al The Law of Delict* 33-35.
638 Bishop "Remedies" in *CLOSA* 9-151.
639 Bishop "Remedies" in *CLOSA* 9-151.
640 *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of South Africa* 2000 2 SA 674 (CC) para 44 where the court held that: "There is only one system of law. It is shaped by the Constitution which is the supreme law and all law, including the common law, derives its force from the Constitution and is subject to constitutional control." See also AJ van der Walt *Property and Constitution* (2012) 20, where the author explains that the common law and legislation do not exist separately or independently from the Constitution. See further E van der Sijde *Reconsidering the relationship between property and regulation: A systemic constitutional approach* LLD Stellenbosch University (2015) 181, 184.
641 Van der Walt *Property and Constitution* 23-24, 35. These principles provide guidance when dealing with more than one potentially applicable source of law and ensure selection of the source of law that will contribute to the development of a single system of law. See also Van der Walt *Property and Constitution*. See Chapter 2 in general.
642 Van der Walt *Property and Constitution* 36.

have to rely on the provisions of PIE to protect his or her property rights.[643] While PIE provides for the protection of immovable property in principle by setting out various application procedures under sections 4,[644] 5[645] and 6,[646] it does not provide for compensatory mechanisms.

In the absence of applicable legislation pertaining to an award for constitutional damages in general, courts should rely on the common law (indirect constitutional damages), instead of making a direct appeal to constitutional provisions, whenever it is possible.[647] In this regard, most cases can be adequately addressed through indirect constitutional damages. Only where the common law is "unconstitutional or incapable of serving the relevant constitutional goals", [648] such as providing effective relief, should reliance be placed directly on the Constitution. Accordingly, if indirect constitutional damages fail to provide effective relief given the facts of the case, then reliance can be placed directly on the Constitution.

2 2 Indirect constitutional damages

Indirect constitutional damages are monetary damages that are awarded in terms of the common law or a statute that gives effect to a constitutional right.[649] In this regard, Bishop views every award of delictual damages where the right asserted is also a constitutional right as a constitutional remedy, because the indirect constitutional remedy serves to cure the violation of the constitutional right.[650] The Constitutional

[643] Van der Walt *Property and Constitution* 36; Kruger (2014) *SALJ* 329; Strydom *A hundred years of demolition orders* 350.
[644] Section 4 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 sets out the procedures and requirements an owner or person in charge of land must follow to institute eviction proceedings against unlawful occupiers of his or her property.
[645] Section 5 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 allows an owner or person in charge of land to institute urgent proceedings for the eviction of unlawful occupiers.
[646] Section 6 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 allows organs of State to institute eviction proceedings against unlawful occupiers.
[647] Van der Walt *Property and Constitution* 81-82.
[648] Van der Walt *Property and Constitution* 82. See also Bishop "Remedies" in *CLOSA* 9-157.
[649] Bishop "Remedies" in *CLOSA* 9-151.
[650] Bishop "Remedies" in *CLOSA* 9-151; Loubser *et al The Law of Delict* 33 where the authors state that "this is possible where there is an overlap between a fundamental [constitutional] right and a private-law (subjective) right that the law of delict recognises…One can easily find a delictual counterpart for the following fundamental right: human dignity (section 10), life (section 11), freedom and security of the person (section 12), privacy (section 14)…and *property (section 25)*…[However] some fundamental rights simply do not lend themselves to actions in delict….[A] person is unlikely to have a n action in delict if, for example, that person's *right to housing (section 26)*…is infringed" (emphasis added).

Court first enunciated this proposition in *Fose v Minister of Safety and Security* ("Fose")[651] when it provided that there will be many cases where the common law will be broad enough to provide all the relief that would be appropriate for breach of constitutional rights.[652] The claim for constitutional damages in this regard was adjunct to a claim for delictual damages arising out of alleged assault and torture of the plaintiff by members of the police force.[653] The cause of action was based on the infringement of the plaintiff's constitutional right to dignity and the right not to be unlawfully tortured.[654]

The court per Ackermann J held that:

> "[T]here can, in my view, be no place for further constitutional damages in order to vindicate the rights in question. Should the plaintiff succeed in proving the allegations pleaded he will no doubt, in addition to a judgment finding that he was indeed assaulted by members of the police force in the manner alleged, be awarded substantial damages. This, in itself, will be a powerful vindication of the constitutional rights in question requiring no further vindication by way of an additional award of constitutional damages."[655]

Ackermann J accordingly found that delictual damages constituted an adequate vindication of the plaintiff's right, and refused the additional claim for constitutional damages.

Generally, direct constitutional damages will be inappropriate where the existing law provides a remedy that fully vindicates the constitutional right.[656] In such cases there is no need to rely on the Constitution to create a new self-standing remedy.[657] Bishop

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[651] 1997 3 SA 786 (CC); Liebenberg *Socio-Economic Rights* 438.
[652] *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) para 58. Nugent JA in *MEC Department of Welfare, Eastern Cape v Kate* 2006 4 SA 478 (SCA) para 30 similarly expressed the view that the common law of delict is capable of being extended to encompass state liability for the breach of constitutional obligations. In *Law Society of South Africa v Minister of Transport* 2011 1 SA 400 (CC) para 74 Moseneke DCJ points out that "it seems that in an appropriate case a private-law delictual remedy may serve to protect and enforce a constitutionally entrenched fundamental right. Thus a claimant seeking appropriate relief to which it is entitled, may properly resort to a common law remedy in order to vindicate a constitutional right."
[653] Liebenberg *Socio-Economic Rights* 438.
[654] *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) para 1; Liebenberg *Socio-Economic Rights* 438.
[655] *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) para 67.
[656] *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) para 67; Bishop "Remedies" in *CLOSA* 9-152; Loubser *et al The Law of Delict* 33.
[657] Bishop "Remedies" in *CLOSA* 9-152. See also Van der Walt *Property and Constitution* 36, 40-43, 81-91.

remarks that Ackermann J in *Fose* did not set this principle as an absolute rule.[658] However, it is seemingly difficult to think of a scenario where another form of relief (damages or otherwise) is available through the common law or statute and direct constitutional damages would still be justified as a remedy.[659] It is accordingly advisable that litigants first determine whether they have a common law[660] or statutory claim, before relying on a claim for direct constitutional damages. This is in line with the single-system-of-law and subsidiarity principles briefly mentioned above.[661]

In subsequent judgments, the law of delict has been developed to recognise claims based on constitutional values and rights.[662] While courts in this regard have been very eager to develop the common law to provide remedies for those who have suffered physical injury as a result of State negligence or abuse[663] it has been less sympathetic to those persons who have only incurred financial loss as a result of the State's negligence.[664] Accordingly, courts may be less inclined to award delictual damages to a land owner suffering financial loss of his or her property.

Bishop further points out that the Constitution is not just a source of direct constitutional remedies, but it also underwrites the creation and the award of indirect constitutional

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[658] Van der Walt *Property and Constitution* 36, 40-43, 81-91.
[659] Bishop "Remedies" in *CLOSA* 9-156.
[660] Loubser *et al The Law of Delict* 22 where the authors explain that a litigant will have to prove that all five elements (harm, conduct, causation, fault and wrongfulness) of liability found in delict are present in order to be successful for a claim for damages.
[661] See 2 above. *Ex Parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa* 2000 2 SA 674 (CC) para 44; Van der Walt *Property and Constitution* 19-20; AJ van der Walt "Normative pluralism and anarchy: Reflections on the 2007 term" (2008) 1 *CCR* 77.
[662] Liebenberg *Socio-Economic Rights* 439. See for example *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC); *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA); *Van Eeden v Minister of Safety and Security* 2003 1 SA 389 (SCA); *Zealand v Minister for Justice and Constitutional Development* 2008 4 SA 458 (CC).
[663] See *Van Eeden v Minister of Safety and Security* 2003 1 SA 398 (SCA) para 19 where the court stated: "An important consideration in favour of recognising delictual liability for damages on the part of the State in circumstances such as the present is that there is no other practical and *effective* remedy available to a victim of violent crime. Conventional remedies such as review and mandamus or interdict do not afford the victim of the crime any relief at all. The only *effective* remedy is a private law delictual action for damages" (my emphasis). Similarly, in *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) para 22 it was held that "there is no effective way to hold the state to account in the present case other than by way of an action for damages"; *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC).
[664] Bishop "Remedies" in *CLOSA* 9-154. See *Olitzki Property Holdings v State Tender Board* 2001 3 SA 1247 (SCA); *Premier of the Province of the Western Cape v Fair Cape Property Developers (Pty) Ltd* 2003 6 SA 13 (SCA); *Steenkamp v Provincial Tender Board of the Eastern Cape* 2007 3 BCLR 300 (CC) where courts have refused to develop common law administrative principles to provide for compensation where the constitutional right to administrative justice has been infringed.

damages.[665] Generally, indirect constitutional damages occur where the Constitution is used to develop the common law (or interpret a statute) in order to provide a damages claim where no such claim was previously recognised.[666] In this regard, Kruger argues that the existing legal scheme regarding evictions, without more, fails to strike a proper balance among the rights and interests of owners, occupiers and society.[667] He argues that this institutional failure arbitrarily deprives landowners of property and that to remedy this constitutional defect such owners must, as a rule, be afforded a compensatory remedy against the State.[668] Furthermore, he states that the South African law on property and housing rights is incomplete, because of the absence of an effective right of financial redress for persons affected by the unlawful occupation of land in which they have rights.[669] He proposes that the court must either declare the PIE unconstitutional to the extent that it fails to afford affected parties a compensatory remedy against the State for loss incurred in these types of eviction cases; or the courts must forge a novel constitutional remedy affording parties a right to claim some measure of damage from the State.[670]

Accordingly, a land owner, before instituting a claim for constitutional damages, should consider whether it has a claim for damages arising out of delict which will adequately vindicate his or her property rights.[671] The owner did not rely on the common law and neither did the Constitutional Court. However, the court in *Modderklip* CC nevertheless stated that "it could even be open to Modderklip to bring a separate delictual action against the State."[672] However, even if the facts showed that the land owner had been deprived of his right to property that did not necessarily establish a right to claim delictual damages.[673] A further issue is whether the actions, or more accurately,

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[665] Bishop "Remedies" in *CLOSA* 9-152.
[666] Bishop "Remedies" in *CLOSA* 9-152. See for example *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC).
[667] Kruger (2014) *SALJ* 329; Strydom *A hundred years of demolition orders* 350-351, 362; A Walters "A balancing act between owners and occupants: Is PIE unconstitutional?" (2013) *De Rebus* 22-25.
[668] Kruger (2014) *SALJ* 329.
[669] Kruger (2014) *SALJ* 329. See also *Fose v Minister of Safety and Security* 1997 7 BCLR (CC) para 69; Bishop "Remedies" in *CLOSA* 9-65-9-78; Mbazira *Strategies for effective implementation* 5.
[670] Kruger (2014) *SALJ* 329-330; 350-351, 362.
[671] Section 25(1) of the Constitution of the Republic of South Africa, 1996; Laubser *et al The law of delict* 34-35, 39. See also Van der Walt *Constitutional Property Law* 17-18 and T Roux "Property" in S Woolman and M Bishop (eds) *Constitutional Law of South Africa* 2 ed (OS 12 2003) 41-1-41-37.
[672] *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) para 60. See 4 2 below. See also in general Christmas (2005) *ESR Review* 6-10; Khoza (2005) *ESR Review* 10-11; Van der Walt (2005) *SAJHR* 144-161.
[673] *Minister of Police v Mboweni* 2014 6 SA 356 (SCA) para 18.

inaction, of the State in failing to execute the eviction order constituted a wrongful act in relation to the land owner and the unlawful occupiers. This requires the court to decide whether the State had a legal duty to protect the constitutional rights of the land owner and the unlawful occupiers. Not every breach of constitutional duty is equivalent to unlawfulness in the delictual sense and therefore not every breach of a constitutional obligation constitutes unlawful conduct.[674] It follows that where neither the common law nor statute provides for full adequate and effective relief to remedy a constitutional right infringement, a land owner may rely on a claim for direct constitutional damages to vindicate the rights[675] in question.[676] Furthermore, in the absence of an amendment to PIE as proposed by Kruger, it is necessary to develop a general framework for constitutional damages. Arguably, the establishment of a general framework for constitutional damages may better serve the South Africa constitutional dispensation by vindicating rights infringed by the State effectively and directly.[677]

2 3 Direct constitutional damages

Despite the court's cautious approach to awards of constitutional damages in *Fose*, the court nevertheless affirmed that:

> "[T]here is no reason in principle why "appropriate relief" should not include an award of [direct constitutional] damages, where such an award is necessary to protect and enforce [the Bill of Rights]".[678]

[674] *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 3 BCLR 300 (CC) paras 37-40. In *Steenkamp* Moseneke DCJ summarised the position as follows: whether a legal duty to prevent loss occurring exists, calls for a value judgment embracing all the relevant facts and involving what is reasonable and, in view of the court, consistent with the common convictions of society. However, where there is a legal duty, not every breach of a constitutional or statutory duty is wrongful in the delictual sense for that reason alone. In addition, it must be reasonable to compensate the plaintiff i.e. where State action was taken in bad faith or under corrupt circumstances or completely outside the legitimate scope of the empowering provision.
[675] Section 25(1) and section 34 of the Constitution of the Republic of South Africa, 1996. Currie & De Waal *The Bill of Rights* 200. See also Van der Walt *Constitutional Property Law* 17-18 and Roux "Property" in *CLOSA* 41-1-41-37.
[676] *MEC Department of Welfare, Eastern Cape v Kate* 2006 4 SA 478 (SCA). See also De Beer & Vettori (2007) *PELJ* 2-26 in general.
[677] Barns (2013) *Responsa Meridiana* 22. See furthermore *Vancouver (City) v Ward* 2010 2 SCR 28 SCC; Okpaluba (2012) *Stell LR* 55-75 55-56 and Hunt (2011) *Cambridge Student LR* 115.
[678] *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) para 60.

Direct constitutional damages flow from the Constitution alone.[679] It can be regarded as damages that arise from a provision or a principle in the Constitution rather than from the common law or a statute which protects a constitutional right.[680] In this regard, Bishop identifies three types of direct constitutional damages which have been at least recognised notionally.[681] Such types include: damages to compensate for loss;[682] punitive damages in addition to damages already claimed;[683] and nominal or symbolic damages.[684]

As was highlighted in Chapter 2, existing remedies, including a structural interdict, do not provide effective relief in all instances. It is within this context that the discussion of damages takes place, specifically the necessity of developing a general framework for direct constitutional damages in South Africa. Accordingly, the scope of the following discussion is restricted to *direct* constitutional damages so as to compensate for loss in the context of evictions.[685] In this regard, it is postulated that the proposed

[679] Bishop "Remedies" in *CLOSA* 9-151.
[680] Bishop "Remedies" in *CLOSA* 9-156.
[681] Bishop "Remedies" in *CLOSA* 9-157. Interestingly, American jurisprudence has also recognised and distinguished between three types of damages: compensatory damages; punitive damages and nominal or symbolic damages. For a comparative perspective on the different types of constitutional damages see JC Love "Damages: A remedy for the violation of constitutional rights" (1979) 67 *California LR* 1242-1285 and JC Love "Presumed general compensatory damages in constitutional tort litigation: A corrective justice perspective" (1992) 49 *Washington and Lee LR* 67-91.
[682] See a discussion of *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) at 4 2 below. See also Christmas (2005) *ESR Review* 6-10; Khoza (2005) *ESR Review* 10-11 and Van der Walt (2005) *SAJHR* 144-161.
[683] For a discussion on punitive damages see Bishop "Remedies" in *CLOSA* 9-160-9-161 where the author accurately describes *Fose* as creating a presumption against punitive damages; *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) para 65 read with para 71 where the court rejected an award for punitive constitutional damages. In this regard, the majority set out twelve points of criticism against the use of punitive constitutional damages: (a) Punitive damages run counter to the tradition of "carefully calculated compensatory damages"; (b) an expanded notion of the type of damages available for individual damages can achieve the same goal without shifting the focus from the individual; (c) there is no empirical evidence that punitive damages have any deterrent effect; (d) even if punitive damages can lead to systemic change, other relief can achieve the same goal faster; (e) punitive damages are too forward looking, detracting from the wrong actually suffered by the claimant; (f) it provides an unjustifiable windfall; (g) funds can be better spent on directly improving the problems; (h) there is no warrant for punitive damages where the problem cannot be solved by deterrence; (i) the symbolic importance of the right can be demonstrated just as well through non-pecuniary relief; (j) punitive damages are inappropriate in class actions; (k) they exact punishment without the safeguards of the criminal process; and (l) such awards against the State will ultimately be borne by the taxpayers. However, the majority made it clear that this decision was limited to the facts of the specific case, which left the door open for the possibility of punitive damages in future matters. See also AK Funnah & O Sibanda "Towards a selective awarding of punitive damages awards in South Africa? A comment on *Fose v Minister of Safety and Security*" (2008) 48 *Codicillus* 36-49. See Love (1979) *California LR* 1247, 1274-1282 for an American jurisprudence perspective on punitive constitutional damages.
[684] For a discussion on nominal or symbolic damages see Bishop "Remedies" in *CLOSA* 9-162.
[685] Liebenberg *Socio-Economic Rights* 439-442. In this regard, Liebenberg states that constitutional damages have been awarded in the context of evictions in order to reconcile the protection of property

development of a general framework for awarding direct constitutional damages may potentially increase the use thereof by the South African courts and consequently remedy constitutional rights infringements and deter future infringements.

3 A general framework for direct constitutional damages

3 1 Introduction

Section 38 of the Constitution provides that a court may grant appropriate relief where a right in the Bill of Rights has been infringed or threatened. In this regard, appropriate relief may include an award for constitutional damages.[686]

The court in *Fose* stated in this regard that:

> "[Constitutional damages] are made to compensate persons who have suffered loss…When it would be necessary to do so, and what the measure of damages should be will *depend on the circumstances of each case* and the particular right which has been infringed" (my emphasis).[687]

Although courts have recognised that constitutional damages may be an appropriate remedy to vindicate rights effectively,[688] such cases are uncommon and it seems that the appropriateness of constitutional damages will only arise where no alternative remedy is available. The rare use of direct constitutional damages[689] indicates that the doctrine of constitutional damages remains vague in South African law. Accordingly, a general framework for constitutional damages should be developed in order to maximise the use of constitutional damages as an effective remedy for the violation of constitutional rights.[690]

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and housing rights. See a discussion of *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) at 4 2 below.

[686] *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) para 60; *Vancouver (City) v Ward* 2010 2 SCR 28 (SCC).

[687] *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) para 60.

[688] *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) para 60.

[689] *MEC Department of Welfare, Eastern Cape v Kate* 2006 4 SA 478 (SCA) and *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC). These are the only two cases to date, where constitutional damages were awarded.

[690] Barns (2013) *Responsa Meridiana* 22.

In this regard, Barns states that:

> "The establishment of a general framework for constitutional damages will better serve the South African constitutional dispensation by vindicating the rights infringed by the State effectively and directly…A defined doctrine of constitutional damages will provide a step forward in realising the constitutional vision of SA by ensuring the state plays the role the constitution evinced".[691]

3 2 Exploration of the Canadian approach to direct constitutional damages

While a development of a framework for direct constitutional damages is necessary in general, it may prove particularly valuable within the eviction context. That is the case as more conventional remedies, like a structural interdict, may not provide effective relief in all instances. As mentioned above, because a framework is lacking in South Africa, it is prudent to explore other jurisdictions for insight and guidance. In the absence of an in-depth legal comparative study, a possible framework that may provide such guidance is that of the Canadian Charter damages, as developed by way of case law.

Similar to section 38 of the Constitution, section 24(1) of the Canadian Charter of Rights and Freedoms ("the Charter") provides that "[a]nyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances". Furthermore, the differences between the Canadian law of tort and the South African law of delict, will not affect the usefulness of the comparison, because the framework can be developed or adopted to suit the South African remedial process specifically.[692]

In *Vancouver (City) v Ward* ("Ward"),[693] a local attorney was wrongfully arrested for the breach of peace during a ceremony in Vancouver and taken into custody.[694] While in custody of the police he was subjected to a strip search. His car was also impounded for the purposes of a search, pending the obtainment of a warrant. Accordingly, the

[691] Barns (2013) *Responsa Meridiana* 22.
[692] Barns (2013) *Responsa Meridiana* 21-22.
[693] 2010 2 SCR 28 (SCC) para 40. See also Okpaluba (2012) *Stell LR* 55-75 55-56; Hunt (2011) *Cambridge Student LR* 115.
[694] *Vancouver (City) v Ward* 2007 BCSC 3; Hunt (2011) *Cambridge Student LR* 115.

plaintiff sued the police for violating his right to be free from unreasonable search and seizure, guaranteed by sections 8 and 9 of the Charter. Notwithstanding the absence of bad faith by the police, the court *a quo* found that the rights of the plaintiff were indeed violated and awarded constitutional damages.[695]

The Supreme Court had to determine when it would be appropriate to award direct constitutional damages as a remedy under section 24(1) of the Charter.[696] Consequently, the court in *Ward* laid down a four step approach to determine when constitutional damages may be awarded.[697] However, the court also warned that granting direct constitutional damages is a new endeavour and "an approach to when [direct constitutional] damages are appropriate and just should develop incrementally."[698] This approach could serve as an example of how South Africa could establish a framework for constitutional damages for State liability under section 38 of the Constitution.[699] Each of these steps are apposite to South African law and will accordingly be discussed.[700]

Firstly, the court has to determine whether there has been a breach of one or more of the fundamental rights listed in the Charter.[701] In this regard, the plaintiff must prove that one or more of their Charter rights were breached by the State.[702] In South African law it would be articulated as whether the State has breached one or more of the plaintiff's rights contained in the Bill of Rights.[703] Although there are similar rights in the Charter to those listed in the Bill of Rights[704] the Charter does not expressly protect property rights as a fundamental right, similar to section 25 of the South African Constitution. However, this should not impede the South African courts from following

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[695] *Vancouver (City) v Ward* 2007 BCSC 3 which was upheld by the Court of Appeal in *Vancouver (City) v Ward* 2009 BCCA 23; Hunt (2011) *Cambridge Student Law Review* 115.
[696] *Vancouver (City) v Ward* 2010 2 SCR 28 (SCC) paras 1 and 3; Okpaluba (2012) 55 *Stell LR* 64.
[697] *Vancouver (City) v Ward* 2010 2 SCR 28 (SCC) paras 4, 15 and 74; Hunt (2011) *Cambridge Student LR* 115-116.
[698] *Vancouver (City) v Ward* 2010 2 SCR 28 (SCC) para 21.
[699] Barns (2013) *Responsa Meridiana* 17.
[700] Barns (2013) *Responsa Meridiana* 17.
[701] *Vancouver (City) v Ward* 2010 2 SCR 28 (SCC) para 23; Hunt (2011) *Cambridge Student LR* 115. In this regard, it was found that the plaintiff's rights under sections 8 and 9, which are similar to section 35 of the Constitution of the Republic of South Africa, 1996, were violated.
[702] *Vancouver (City) v Ward* 2010 (SCC) 27 paras 50-53 and 61, Okpaluba (2012) *Stell LR* 66.
[703] Barns (2013) *Responsa Meridiana* 17-18.
[704] Compare section 9 of the Constitution with section 15 of the Charter; sections 11 and 12 of the Constitution with section 7 of the Charter; sections 15, 16 and 17 of the Constitution with section 2 of the Charter; section 19 of the Constitution with section 3 of the Charter; sections 20 and 21 of the Constitution with section 6 of the Charter; sections 34 and 38 of the Constitution with section 24 of the Charter; section 35 of the Constitution with sections 8, 9, 10, 11, 12, 13 and 14 of the Charter.

the four step approach to determine when constitutional damages may be awarded.[705] Accordingly, in the context of evictions, the land owner would have to prove that his or her section 25[706] and/or section 34 enshrined rights have been infringed due to State non-compliance.[707]

Secondly, the damages sought must serve a useful function or purpose – the damages must be "functionally justified".[708] This entails either promoting the general objects of the Charter by remedying the personal loss caused by the rights violation; the vindication of Charter rights to affirm constitutional values; and/or deterring future violations by the State.[709] Essentially, these steps require that it must be proved that constitutional damages will be "appropriate and just".[710] According to *Fose* awarding constitutional damages for the breach of a constitutional right will primarily depend on the circumstances of each case.[711] However, whether relief in the form of constitutional damages is appropriate in a particular case must necessarily be determined casuistically with due regard to, amongst other things, the nature and relative importance of the rights that are in issue, the alternative remedies that might be available to assert and vindicate them, and the consequences of the breach for the claimant concerned.[712] Furthermore, in assessing the appropriateness of constitutional damages the court must conduct a context-sensitive analysis.[713] Therefore, courts generally have to consider the particular facts of the case having regard to the following factors: the nature and relative importance of the rights, the position of the applicant and others similarly placed,[714] the availability of alternative remedies and whether constitutional damages will constitute the most effective means

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[705] Barns (2013) *Responsa Meridiana* 17.
[706] *Modder East Squatters v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa v Modderklip Boerdery* 2004 3 All SA 169 (SCA). See also A Christmas "Property rights of land owners v socio-economic rights of occupiers: case review" (2004) 5 ESR *Review* 11-13; Van der Walt (2005) *SAJHR* 144-161.
[707] *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) where it was held that section 34 of the Constitution of the Republic of South Africa, 1996 was infringed.
[708] *Vancouver (City) v Ward* 2010 2 SCR 28 (SCC) paras 24-31 where the court held that direct constitutional damages will be functionally justified if it promotes the objects of the Charter. See also Hunt (2011) *Cambridge Student LR* 115-116; Okpaluba (2012) *Stell LR* 68. This is known as the "functional justification of damages".
[709] Barns (2013) *Responsa Meridiana* 18; *Vancouver (City) v Ward* 2010 (SCC) 27 paras 41-44.
[710] *Vancouver (City) v Ward* 2010 2 SCR 28 (SCC) para 44; A Linden "Charter Damages Claims: New Dawn or Mirage" (2012) *Advocates' QR* 431-432.
[711] *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) para 60.
[712] *Department of Welfare, Eastern Cape v Kate* 2006 4 SA 478 (SCA) para 25.
[713] Liebenberg *Socio-Economic Rights* 446.
[714] *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) para 45.

of securing State compliance with its constitutional obligations and the consequences of the infringement in question.[715] Other case-specific factors may also be considered in determining whether it will be appropriate to grant constitutional damages.[716] If the plaintiff is successful in proving that there was a breach of his or her constitutionally enshrined rights and that it would be appropriate to award constitutional damages, then a *prima facie* case is established against the State.[717]

Thirdly, the State then has the opportunity to refute the *prima facie* case.[718] The State must show that there are countervailing factors that indicate that constitutional damages are inappropriate.[719] The court in *Ward* only established two considerations in this regard. These are the existence of alternative remedies[720] and "concerns for good governance".[721] The first consideration is where the State can prove that there is an alternative remedy which serves the same function as constitutional damages.[722] In this regard, the court held that the mere existence of a potential tort claim does not bar a claimant from obtaining direct constitutional damages.[723] However, where the State can show that a tort claim would result in an award of damages that adequately addresses the Charter breach, then the claimant will not be able to claim direct constitutional damages.[724] Similarly, no separate award for direct constitutional damages will be made by the South African courts where there is a delictual or statutory mechanism for the claimant to receive compensation for a rights violation.[725] While this consideration seeks to avoid double compensation, it must still be clear that the proposed alternative remedy provides effective relief.[726] This step is in line with the approach followed in *Fose.*[727] As mentioned above, the second consideration is "good

[715] *MEC for the Department of Welfare v Kate* 2004 6 SA 40 (SCA) para 25. These factors are discussed below in order to establish whether constitutional damages constituted an appropriate and effective remedy in *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC).
[716] *MEC for the Department of Welfare v Kate* 2004 6 SA 40 (SCA) para 25.
[717] Okpaluba (2012) *Stell LR* 70; (2012) *Advocates' QR* 432.
[718] *Vancouver (City) v Ward* 2010 2 SCR 28 (SCC) paras 31-43; Hunt (2011) *Cambridge Student LR* 115; Okpaluba (2012) *Stell LR* 70; Linden (2012) *Advocates' QR* 432.
[719] *Vancouver (City) v Ward* 2010 2 SCR 28 (SCC) para 33; Hunt (2011) *Cambridge Student LR* 116; Okpaluba (2012) *Stell LR* 70.
[720] *Vancouver (City) v Ward* 2010 2 SCR 28 (SCC) para 35; Hunt (2011) *Cambridge Student LR* 116.
[721] *Vancouver (City) v Ward* 2010 2 SCR 28 (SCC) para 33; Hunt (2011) *Cambridge Student LR* 117.
[722] *Vancouver (City) v Ward* 2010 2 SCR 28 (SCC) para 33; Okpaluba (2012) *Stell LR* 70.
[723] *Vancouver (City) v Ward* 2010 2 SCR 28 (SCC) para 35.
[724] *Vancouver (City) v Ward* 2010 2 SCR 28 (SCC) para 35. Similarly, the court in *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) para 67.
[725] *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) para 67.
[726] *Vancouver (City) v Ward* 2010 2 SCR 28 (SCC) paras 35-36, 44-46; Okpaluba (2012) *Stell LR* 70.
[727] *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) para 69 where the court stated that "an appropriate remedy must mean an effective remedy".

governance".[728] An award for constitutional damages inevitably has an impact on the financial resources of the State. However, the argument that an award for constitutional damages will effectively impede the day-to-day administration and functions of the State, cannot be raised as the only ground to avoid liability.[729] Instead, an award of constitutional damages against the State arguably has the potential to promote good governance, because it improves or ensures compliance with constitutional obligations and court orders.

Although only two considerations were mentioned in *Ward*, the court recognised that the law in this regard must be left open for further development.[730] Where the State's failure in the South African context occurs in circumstances that offer no effective remedy other than an action for constitutional damages, the norm of accountability will ordinarily demand the recognition of a legal duty unless there are other considerations affecting the public interest that outweigh that norm.[731] In South Africa, constitutional damages accordingly test whether the State has lived up to the requirements of section 7 of the Constitution, or the norm of accountability.[732] Countervailing factors, that could possibly outweigh the legal and constitutional duties imposed on the State, are likely to be raised if this framework were applied in South Africa.[733] Such restraints may include limited capacities and available resources. However, the South African Constitutional Court held that it is the role of the court to require that the State take measures to meet its constitutional obligations.[734] Even simple declaratory orders against the State may have budgetary implications for the State.[735] However, the State is constitutionally bound to give effect to such orders and it has to find the resources to do so.[736]

[728] *Vancouver (City) v Ward* 2010 2 SCR 28 (SCC) para 38; Okpaluba (2012) *Stell LR* 70.
[729] *Vancouver (City) v Ward* 2010 2 SCR 28 (SCC) paras 44-46; Okpaluba (2012) *Stell LR* 70.
[730] *Vancouver (City) v Ward* 2010 2 SCR 28 (SCC) para 44; Okpaluba (2012) *Stell LR* 70.
[731] *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) para 21.
[732] *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) para 21.
[733] Barns (2013) *Responsa Meridiana* 19; *McIntosh v Premiere, Kwa-Zulu Natal* 2008 6 SA 1 (SCA) is indicative of this where the municipality sought to avoid being held accountable. The State argued that, having regard to its resource restraints, it did not act unreasonably or negligently.
[734] *Minister of Health v Treatment Action Campaign (No 2)* 2002 5 SA 721 (CC) para 38.
[735] *Minister of Health v Treatment Action Campaign (No 2)* 2002 5 SA 721 (CC) para 99.
[736] *Minister of Health v Treatment Action Campaign (No 2)* 2002 5 SA 721 (CC) para 99.

Finally, if it is found that constitutional damages are appropriate, all that is left to determine is the *quantum* of damages.[737] The *quantum* needs to be determined with due regard to the circumstances of the case.[738] The court should consider the seriousness of the violation; the impact thereof on the claimant and the seriousness of the State's misconduct, when determining the quantum for direct constitutional damages.[739] According to the Canadian court, the *quantum* of damages must also be fair to both the claimant and the State.[740] In this regard, the court held that:

> "[T]he court may take into account the public interest in good governance, the danger of deterring governments from undertaking beneficial new policies and programs, and the need to avoid diverting large sums of funds from public programs to private interests".[741]

The Canadian court's insistence that awards for direct constitutional damages must be fair to both the claimant and the defendant and that the courts should consider issues of the State's budget is worrisome, in principle.[742] Effectively, special exception is made where the State is the defendant "whereby [direct constitutional] damages awarded against the [S]tate may be assessed at a lower tariff than those against private defendants in similar circumstances".[743] Accordingly, State officials and private defendants should not be treated differently by the courts, in relation to the amount of compensation payable to the claimant.[744]

The quantification of direct constitutional damages may be difficult to determine, given the particular circumstances of the case. However, in light of the specific and unique circumstances of each eviction case, the court should arguably be given a wide

[737] *Vancouver (City) v Ward* 2010 2 SCR 28 (SCC) paras 45-57, specifically para 55; Hunt (2011) *Cambridge Student LR* 115-116; Okpaluba (2012) *Stell LR* 72.
[738] *Vancouver (City) v Ward* 2010 2 SCR 28 (SCC) paras 48, 51-53; Hunt (2011) *Cambridge Student LR* 117-118. See *Department of Welfare, Eastern Cape v Kate* 2006 4 SA 478 (SCA) and *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) where the quantification of damages was determined with regard to the specific facts of the case. Quantification of damages for rights violations is a complex area of law and falls outside the scope of this thesis.
[739] *Vancouver (City) v Ward* 2010 2 SCR 28 (SCC) para 52.
[740] *Vancouver (City) v Ward* 2010 2 SCR 28 (SCC) para 54.
[741] *Vancouver (City) v Ward* 2010 2 SCR 28 (SCC) para 53.
[742] Hunt (2011) *Cambridge Student LR* 119.
[743] Hunt (2011) *Cambridge Student LR* 119.
[744] Hunt (2011) *Cambridge Student LR* 119. This may amount to an a contravention of section 9(1) of the Constitution of the Republic of South Africa, 1996 which states that everyone is equal before the law.

discretion in relation to the quantification of damages in cases where the State has failed to execute an eviction order.

Ultimately, the framework proposed in *Ward* can serve as a general guide to the South African courts to determine whether it is appropriate to award direct constitutional damages. As such a framework is not extant at the moment, the case law available is analysed with reference to the general framework established in *Ward* instead.

4 The use of direct constitutional damages in South African eviction case law

4 1 Introduction

Thus far, in the context of evictions, there have only been two cases where the court had to determine whether constitutional damages would constitute appropriate and effective relief.[745] However, the Constitutional Court has only awarded direct constitutional damages in one, very unusual case,[746] as a remedy to vindicate the land owner's right to property in eviction cases: *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* ("Modderklip CC").[747] Nevertheless, it is necessary to determine whether an award for damages was appropriate and whether it provided effective relief. Thereafter a discussion of *Blue Moonlight Properties 39 (Pty) Ltd v The Occupiers of Saratoga Avenue* ("Blue Moonlight")[748] follows to illustrate when constitutional damages would *not* constitute appropriate relief.

The determination of whether it was appropriate to award constitutional damages in the abovementioned cases will be discussed with reference to the general framework for direct constitutional damages set out in *Ward*, as elaborated on above.

[745] *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) and *Blue Moonlight Properties 39 (Pty) Ltd v The Occupiers of Saratoga Avenue* 2009 1 SA 470 (W).
[746] JM Pienaar *Land Reform* (2014) 772.
[747] 2005 5 SA 3 (CC). See also Christmas (2005) *ESR Review* 6-10; Khoza (2005) *ESR Review* 10-11; Van der Walt (2005) 21 *SAJHR* 144-161.
[748] 2009 1 SA 470 (W).

4 2 President of Republic of South Africa v Modderklip Boerdery (Pty) Ltd

4 2 1 Background and facts of the case

The background and facts of the "Modderklip case scenario"[749] were discussed above.[750] In short, the High Court found that the failure to execute the eviction order resulted in an infringement of the land owner's right to property.[751] The court also held that the State had not complied with its constitutional responsibilities.[752] Consequently, the High Court issued a structural interdict requiring the State to indicate which steps it proposed to take to execute the eviction order granted.[753] However, the State appealed against the order of the High Court.

Essentially, the Supreme Court of Appeal in *Modder East Squatters v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa v Modderklip Boerdery* ("Modderklip SCA")[754] confirmed the order of the High Court, emphasising that the owner's property rights had been infringed and similarly, that the State had breached its section 26(1) and (2) obligations.[755] The court emphasised that it had a duty to mould appropriate orders that would provide *effective* relief to those affected by a constitutional breach.[756]

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[749] Pienaar *Land Reform* 772; *Modderklip Boerdery (Pty) Ltd v Modder East Squatters* 2001 4 SA 385 (W); *Modderklip Boerdery (Edms) Bpk v President van die Republiek van Suid-Afrika* 2003 1 All SA 465 (T); *Modder East Squatters v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa v Modderklip Boerdery* 2004 3 All SA 169 (SCA); *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC).

[750] See Chapter 2 at 4 2 2.

[751] *Modderklip Boerdery (Edms) Bpk v President van die Republiek van Suid-Afrika* 2003 1 All SA 465 (T). See also Christmas (2003) *ESR Review* 4-7.

[752] Section 26(1) and (2) read with section 25(5) of the Constitution, 1996; *Modderklip Boerdery (Edms) Bpk v President van die Republiek van Suid-Afrika* 2003 1 All SA 465 (T) paras 46, 52; Pienaar *Land Reform* 772. See also J van Wyk "The relationship (or not) between the rights of access to land and housing: de-linking land from its components" (2005) 16 *Stell LR* 466-487.

[753] *Modderklip Boerdery (Edms) Bpk v President van die Republiek van Suid-Afrika* 2003 1 All SA 465 (T). See Chapter 2 above at 4 2 3.

[754] 2004 3 All SA 169 (SCA). See also Christmas (2004) *ESR Review* 11-13; Van der Walt (2005) 21 *SAJHR* 144-161.

[755] *Modder East Squatters v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa v Modderklip Boerdery* 2004 3 All SA 169 (SCA) para 52; Pienaar *Land Reform* 772.

[756] *Modder East Squatters v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa v Modderklip Boerdery* 2004 3 All SA 169 (SCA) para 44 citing *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) para 94 and *Minister of Health v Treatment Action Campaign (No 2)* 2002 5 SA 721 (CC) para 102.

In this regard, the court reasoned that:

> "[E]ffective relief…will obviously differ from case to case…[and that] constitutional remedies will differ by circumstance. The only appropriate [and effective] relief that, in the particular circumstances of the case, would appear to be justified is that of [direct] 'constitutional damages' i.e. damages due to the breach of a constitutionally entrenched right. No other remedy is apparent. Return of the land is not feasible. There is in any event no indication that the land, which was being used for cultivating hay, was otherwise occupied by the lessees or inhabited by anyone else. Ordering the State to pay damages to [the land owner] has the advantage that the…[unlawful] occupiers can remain where they are while [the land owner] will be recompensed for that which it has lost and the State has gained by not having to provide alternative land…[and] Modderklip will not receive more that what it has lost…".[757]

Accordingly, the court ordered that constitutional damages be paid to the landowner to compensate him for what he had lost and what the State had gained by not having to provide alternative land for settlement.[758] However, once more the State appealed to the Constitutional Court against the abovementioned order.

4 2 2 The judgment and order of the court

In *Modderklip CC* the State averred that the land owner's right to property and the occupier's rights to have access to adequate housing had not been breached.[759] In this regard, the Constitutional Court held that it was unnecessary to decide whether the land owner's right to property and the rights of the unlawful occupiers had been breached.[760] Instead, it decided that the basis for granting constitutional damages rested upon an infringement of section 34 of the Constitution and the rule of law.[761]

The Constitutional Court reasoned as follow. As a point of departure, the court referred to section 1(c) of the Constitution which enshrines the supremacy of the Constitution

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[757] *Modder East Squatters v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa v Modderklip Boerdery* 2004 3 All SA 169 (SCA) para 43.
[758] *Modder East Squatters v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa v Modderklip Boerdery* 2004 3 All SA 169 (SCA) para 52.
[759] *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) para 22.
[760] *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) para 26.
[761] *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) paras 48, 51 read with para 68.

and the rule of law.[762] These values are foundational to the constitutional order. The obligation of the State to provide the necessary mechanisms for citizens to resolve disputes that arise between them flows from the rule of law.[763] The court held that this obligation has its corollary in the right or entitlement of every person to have access to the courts.[764] The court furthermore held that the State "holds the key"[765] to executing the eviction order and that there is no possibility that the eviction order will be executed without effective participation by the State. The State is not only obligated to provide necessary mechanisms for citizens to resolve their disputes, but it is also obliged to take reasonable steps, where possible, to ensure that large-scale disruptions in the social fabric do not occur in the wake of the execution of court orders.[766] Failure to take such reasonable steps will undermine the rule of law.[767]

Returning to the facts of the case, the court held that the land owner's position, as a victim of unlawful occupation of its property on a large scale, was aggravated by the failure to execute the eviction order within a reasonable time.[768] The failure by the State to act in an appropriate manner in the circumstances means that the land owner, and others similarly placed, will not be able to rely on the State and its organs to protect them from invasions of their property.[769] Accordingly, court orders must be executed in a manner that prevents social upheaval.[770] The purpose of the rule of law would otherwise be subverted by the very execution process that ought to be upheld by it.[771]

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[762] Section 1(c) of the Constitution of the Republic of South Africa, 1996.
[763] *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) para 39.
[764] *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) paras 24, 41 read with sections 34 and 165 of the Constitution of the Republic of South Africa, 1996.
[765] *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) para 42.
[766] *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) para 43.
[767] *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) para 43.
[768] *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) para 44.
[769] *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) para 45.
[770] *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) para 46.
[771] *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) para 46.

However, the court rightly held that the circumstances of the "Modderklip case scenario"[772] were so extraordinary that it was not possible to rely on the mechanism that would normally be employed to execute eviction orders.[773] That being said, the court found that it was unreasonable of the State to stand by and do nothing in circumstances where it was impossible for the land owner to evict the unlawful occupiers because of the magnitude of the invasion of the particular circumstances of the occupiers.[774] The State was nevertheless required to take reasonable steps to ensure that the land owner was provided with effective relief.[775] The court suggested in this regard that the State could have either expropriated the property or provided other land.[776] Either one of these options available to the State would have alleviated the continuing burden on the land owner to provide the unlawful occupiers with accommodation.[777] Consequently, the State's failure to take any form of steps to assist the land owner, resulted in a breach of the land owner's constitutional right to an effective remedy as required by the rule of law and entrenched in section 34 of the Constitution.[778]

The court, in finding a corresponding appropriate remedy, held that an "appropriate remedy must necessarily be effective".[779] Langa ACJ specifically referred to the findings in *Fose* that sometimes constitutional damages would be the only appropriate

[772] Pienaar *Land Reform* 772; *Modderklip Boerdery (Pty) Ltd v Modder East Squatters* 2001 4 SA 385 (W); *Modderklip Boerdery (Pty) Ltd v Modder East Squatters* 2003 6 BCLR 638 (T); *Modder East Squatters v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa v Modderklip Boerdery* 2004 3 All SA 169 (SCA); *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC).

[773] *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) para 47.

[774] *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) para 48.

[775] *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) para 51; section 34 of the Constitution of the Republic of South Africa, 1996.

[776] *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) para 51.

[777] *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) para 51.

[778] *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) para 51.

[779] *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) para 58.

relief[780] and stated that the need for an effective remedy *in casu* supported an award of constitutional damages.[781]

The advantages of granting constitutional damages as an appropriate remedy, given the extraordinary circumstances of the case, are threefold. Firstly, it compensates the land owner for the unlawful occupation and deprivation of his property. On the facts of the case it is clear that the land owner was effectively deprived of his right to use and enjoy his property on a permanent or indefinite basis. In other words, the severity and extent of the deprivation justified the award of constitutional damages. Secondly, it ensures that the unlawful occupiers will continue to have accommodation until suitable alternatives are found. Lastly, it relieves the State of the urgent task of having to find such alternatives.[782] Accordingly, the court held that the remedy of constitutional damages constituted the most effective and expeditious way of vindicating the rights of both the land owner and the unlawful occupiers in the circumstances.

4 2 3 Evaluation of the order granted

4 2 3 1 Was it appropriate to award constitutional damages?

The general framework laid down in *Ward*, can be used as guide to determine whether it was appropriate to award direct constitutional damages in *Modderklip CC*. The four step approach, coupled with the listed factors in *Kate*,[783] will accordingly be utilised to determine whether it was appropriate for the Constitutional Court to award direct constitutional damages.

4 2 3 1 1 Step one: Was there a breach of constitutional rights?

The first step of the approach in *Ward* requires that the plaintiff must prove that one or more of his constitutional rights have been breached. In this regard, the land owner must prove that his property rights have been violated. This furthermore requires a determination of the nature of the relevant rights impacted on.

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[780] *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) para 58.
[781] *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) 2005 5 SA 3 (CC) para 58.
[782] *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) para 59.
[783] *MEC for the Department of Welfare v Kate* 2004 6 SA 40 (SCA) para 25.

The courts have emphasised the importance of the right to property and the right not to be arbitrarily deprived of property enshrined in section 25 of the Constitution.[784] However, property rights are not absolute in nature.[785] Therefore, certain unavoidable and burdensome limits may be placed on a land owner's right to use and enjoy his property. Although the landowner cannot be expected to be burdened with providing accommodation to the unlawful occupiers indefinitely, "a [reasonable] degree of patience should be expected"[786] pending the fulfilment of the State's obligation to provide alternative accommodation. In other words, landowners must have a reasonable degree of patience pending the execution of an eviction order.[787] However, it is not expected, nor required that landowners provide land and housing indefinitely without compensation.[788]

It is not only the land owner's rights that have to be taken into account in determining whether an award for constitutional damages is appropriate. The Constitution affords unlawful occupiers a right of access to housing and the right not to be evicted without a court order.[789] The conflicting rights of the land owner and the unlawful occupiers must accordingly be considered with reference to the circumstances of the case and be weighed against each other in order to find an equitable outcome for both parties. It was clear from the facts in *Modderklip CC*, that the land owner was effectively deprived of his right to use and enjoy his property on a permanent or indefinite basis.

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[784] *Blue Moonlight Properties 39 (Pty) Ltd v The Occupiers of Saratoga Avenue* 2009 1 SA 470 (W) paras 93-94; L Chenwi "Government's obligation to unlawful occupiers and private landowners" (2010) 11 *ESR Review* 10. See furthermore Van der Walt *Constitutional Property Law* 17-18 and Roux "Property" in *CLOSA* 41-1-41-37.

[785] CG van der Merwe "Things" in WA Joubert & JA Faris (eds) *LAWSA* 2 ed (RS 1 2014) para 153-156; *City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd* 2015 6 SA 440 (CC) para 106; Bishop "Remedies" in *CLOSA* 9-71; P Dhliwayo *A constitutional analysis of access rights that limit landowners' right to exclude* LLD Stellenbosch University (2015) 89-100; Liebenberg *Socio-Economic Rights* 311-316.

[786] *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) paras 45 and 50-51; *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39* 2012 2 SA 104 (CC) para 100.

[787] Kruger (2014) *SALJ* 329.

[788] *Blue Moonlight Properties 39 (Pty) Ltd v The Occupiers of Saratoga Avenue* 2009 1 SA 470 (W) para 97.

[789] Sections 26(1) and (3) of the Constitution of the Republic of South Africa, 1996, read with Prevention of Illegal from and Unlawful Occupation of Land Act 19 of 1998; *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) para 54. See in general *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC); Liebenberg *Socio-Economic Rights* 344-351; G Muller *The impact of section 26 of the Constitution on the Eviction Squatters in South African Law* LLD Stellenbosch University (2011) 75-82; K McLean "Housing" in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (OS 3 2007) 55-8-55-14.

Moreover, the unlawful occupiers had built homes and established themselves as a community on the property of Modderklip over a long period of time.[790] The unlawful occupiers furthermore had no other option but to remain on the Modderklip property.

Having regard to all the facts and circumstances it would seem as if there was indeed a breach of rights.

4 2 3 1 2 Step two: Will the damages sought serve a "useful function or purpose"?

Essentially, this step requires that it must be proved that an award for direct constitutional damages will be appropriate and just. Importantly, the onus rests on the plaintiff (the land owner) who will have to provide reasons why it would be appropriate to award direct constitutional damages. In this regard, the listed factors in *Kate*, as well as the circumstances of the case, will enable a court to determine whether the damages sought will be appropriate. These factors include: the nature of the relevant rights impacted on, the consequences of the infringement and the availability of alternative remedies. [791]

The first factor listed in *Kate*, the nature of the relevant rights impacted on, has already been discussed in step one above and is therefore not repeated here again.

Concerning the second factor, the consequences of the infringement, the land owner is dispossessed of most (if not all) of the rights of use, benefit and exploitation, where the land continues to be occupied following a failure to execute an eviction order already obtained. Given the long history of the case and the State's continuous failure to execute the eviction order,[792] the unlawful occupation of the land in effect amounted to an indefinite and permanent deprivation of property.[793] The courts have noted that the State's obligation under section 26(2) to adopt reasonable measures did not envisage laws that would indefinitely require the private land owner to be deprived of his or her rights altogether.[794] An indefinite deprivation of the rights of the land owner

[790] *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) para 54.
[791] *MEC for the Department of Welfare v Kate* 2006 4 SA 478 (SCA) para 25.
[792] *Modderklip Boerdery (Pty) Ltd v Modder East Squatters* 2001 4 SA 385 (W).
[793] *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) para 51; J Strydom & S Viljoen (Maass) "Unlawful occupation of inner-city buildings: A constitutional analysis of the rights and obligations involved" (2014) 17 *PELJ* 1230 and 1234.
[794] *Blue Moonlight Properties 39 (Pty) Ltd v The Occupiers of Saratoga Avenue* 2009 1 SA 470 (W) paras 98, 127.

not only constitutes a contravention of section 25(1) of the Constitution,[795] but may also amount to an expropriation of the land owner's property, where the land or property is used to serve a public purpose or interest.[796]

Although alternative remedies were available, the history of the case illustrates that all other remedies were already exhausted by the time the case reached the Constitutional Court. The High Court initially issued a structural interdict which proved to be ineffective.[797] One remedy had already failed and there was no indication retrospectively, that the State would be willing to implement the structural interdict. Yet, the land owners' as well as the unlawful occupiers' rights remained unvindicated, thereby warranting further relief.

There are also certain case-specific circumstances that indicate that the most appropriate remedy in *Modderklip CC* was indeed constitutional damages. Firstly, it had become practically impossible to enforce the eviction order and structural interdict granted in the High Court, due to the large number of unlawful occupiers occupying the land.[798] This necessitated using alternative relief, such as constitutional damages, to vindicate the land owner's right to property. Secondly, the action taken by the land owner was reasonable and lawful. Despite taking all reasonable steps expeditiously to vindicate his rights and interests, the land owner still experienced a burdensome land invasion of indefinite duration. It follows that the large number of people occupying a private owner's land; the impracticality of implementing other remedies and the steps already taken by the land owner may be indicative of whether constitutional damages may be regarded as appropriate relief.

A *prima facie* case against the State is established once the plaintiff has proved that there has been a breach of his or her constitutional rights and has shown why it would be appropriate and just to award direct constitutional damages.

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[795] *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) para 51; *Blue Moonlight Properties 39 (Pty) Ltd v The Occupiers of Saratoga Avenue* 2009 1 SA 470 (W) para 194; Chenwi (2010) *ESR Review* 10.
[796] Section 25(2) of the Constitution of the Republic of South Africa, 1996; *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) para 51.
[797] See Chapter 2 at 4 2 3 and 4 2 4 above in this regard.
[798] Bishop "Remedies" in *CLOSA* 9-72; Pienaar *Land Reform* 774.

4 2 3 1 3 Step three: Are there any countervailing factors?

At this point, the State will have the opportunity to refute the *prima facie* case, by showing that there are countervailing factors that indicate that direct constitutional damages are inappropriate. In this regard, the State may refute the absence of the availability of alternative remedies or show that an award for direct constitutional damages will be inappropriate, due to resource and/or capacity restraints. Although the State suggested that a declaratory order would have been sufficient to vindicate the land owner's rights, the court found that something more effective than the suggested clarification of rights was needed.[799] The State did not present any other countervailing factors to this effect.

Accordingly, the court found that it would be appropriate to award constitutional damages. All that was left to determine was the *quantum* of the damages.

4 2 3 1 4 Step four: The determination of the *quantum*

If the court finds that it will be appropriate to award constitutional damages, then the *quantum* of damages needs to be determined. Although there is no set formula for the determination of the *quantum* for constitutional damages, it is clear that is has to be determined with due regard to the specific circumstances of the case. [800]

Although expropriation was raised as an option during argument, the court held that it did not have the power to grant such an order.[801] Ordering the State to expropriate the land from the owner would result in the court ordering the State not only to fulfil its obligations but also instructing the State *how* to do so. This would be in breach of the doctrine of separation of powers.[802]

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[799] *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) para 60.
[800] *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) paras 56-58 where the court refers to *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) para 19.
[801] *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) paras 41 and 61-62. See also Strydom & Viljoen (Maass) (2014) *PELJ* 1207-1261 1228.
[802] *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) paras 61-62. Section 2 of the Expropriation Act 63 of 1975 reserves the decision to expropriate for the Minister of Public Works; and the New Expropriation Bill B4D-2015 in GN 63 *GG* 38418 of 26-01-2015.

The court held that the measure of damages will depend on the circumstances of each case, as well as the particular right which was infringed.[803] Accordingly, the court in *Modderklip CC*, having regard to the specific circumstances of the case, found that the difficulty of quantifying the compensation can be met by resorting to the mechanism provided for in section 12 of the Expropriation Act 63 of 1975 ("Expropriation Act"). Therefore, the court ordered that the compensation must be calculated in terms of the Expropriation Act. Although the courts do not have the power to order the expropriation of private or State property, the courts can indirectly compel the State to consider the possibility of expropriation when it orders the payment of constitutional damages.[804] Arguably, the court, by awarding compensation on the basis of a fair market value as envisaged by section 12 of the Expropriation Act, indirectly set out to achieve a purchase of the land in question by the State.[805]

[803] *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) paras 56-58 where the court refers to *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) para 19.
[804] Strydom *A hundred years of demolition orders* 351-352.
[805] Once the the New Expropriation Bill B4D-2015 in GN 63 *GG* 38418 of 26-01-2015 is signed into law compensation for an expropriation of property will be determined in accordance with section 12 of the Bill. Section 12(1) of the Bill provides that "[t]he amount of compensation to be paid to an expropriated owner or expropriated holder must be just and equitable reflecting an equitable balance between the public interest and the interests of the expropriated owner or expropriated holder, having regard to all relevant circumstances, including [but not limited to] (a) the current use of the property; (b) the history of the acquisition and use of the property; (c) the market value of the property; (d) the extent of direct State investment and subsidy in the acquisition and beneficial capital improvement of the property; and (e) the purpose of the expropriation". These listed factors for the determination of compensation for an expropriation are in line with and identical to those factors listed in section 25(3) of the Constitution of the Republic of South Africa, 1996. Furthermore section 12(2) of the Bill provides that "the expropriating authority must not, unless there are special circumstances in which it would be just and equitable to do so, take account of - (a) the fact that the property has been taken without the consent of the expropriated owner or expropriated holder; (b) the special suitability or usefulness of the property for the purpose for which it is required by the expropriating authority, if it is unlikely that the property would have been purchased for that purpose in the open market; (c) any enhancement in the value of the property, if such enhancement is a consequence of the use of the property in a manner which is unlawful; (d) improvements made to the property in question after the date on which the notice of expropriation was served upon the expropriated owner and expropriated holder, as the case may be, except where the improvements were in advance agreed to by the expropriating authority or where they were undertaken in pursuance of obligations entered into before the date of expropriation; (e) anything done with the object of obtaining compensation therefor; and (f) any enhancement or depreciation, before or after the date of service of the notice of expropriation, in the value of the property in question, which can be directly attributed to the purpose in connection with which the property was expropriated."

4 2 3 2 Did constitutional damages provide effective relief?

In order to determine whether constitutional damages provided effective relief *in casu*, it is necessary to assert whether the rights of the respective parties were realised.

Given the long history of the case, the Constitutional Court found that constitutional damages would be the most effective and expeditious way of vindicating the rights of the land owner and the unlawful occupiers simultaneously.[806] The land owner was compensated by the State for having to bear the ongoing and indefinite burden of the unlawful occupiers of his property.[807]

The order entitling the residents to remain on the land until alternative land was made available to them ensured that their housing rights were protected.[808] Effectively, the order also ensured the fulfilment of the State's constitutional obligations.[809] Viljoen remarks that the advantage of this order was that the court circumvented "the eviction and allocation of land issue, which solved the immediate access to land problem…".[810] Accordingly, the rights of the respective parties were realised *prima facie.*

However, upon further evaluation, it would appear as if the Constitutional Court sanctioned the continued unlawful occupation of land which, according to Viljoen, most likely amounted to an arbitrary deprivation of property.[811] Viljoen furthermore remarks that the State's constitutional obligation to provide access to adequate housing was ignored by the court, because the court did not place a positive duty on the State to provide services or devise *legally* secure tenure to the unlawful occupiers.[812] The

[806] *President of the Republic of South Africa v Modderklip Boerdery (Pty)* para 58; Pienaar *Land Reform* 773; Liebenberg *Socio-Economic Rights* 441.
[807] *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) para 48.
[808] *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) para 68.
[809] *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) para 59.
[810] S Viljoen "The systemic violation of section 26(1): An appeal for structural relief by the judiciary" (2015) 30 *SAPL* 42-70 46; JM Pienaar "Land reform and housing: Reaching for the rafters or struggling with foundations?" (2015) 30 *SAPL* 1-25 7-8. See also *First National Bank of South Africa Ltd t/a Wesbank v Commissioner South African Revenue Service; First National Bank of South Africa Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) which established the test for determining whether a deprivation amounts to a procedurally and/or substantively arbitrary deprivation. See in general Van der Walt *Constitutional Property Law* 190-333 where he comprehensively discusses the definition of an arbitrary deprivation of property. See also Roux "Property" in *CLOSA* 46-17-46-28; Strydom & Viljoen (Maass) (2014) *PELJ* 1207 1220, 1222-1223, 1231-1235
[811] Viljoen (2015) *SAPL* 46; Strydom & Viljoen (Maass) (2014) *PELJ* 1234.
[812] Viljoen (2015) *SAPL* 46-47; Pienaar (2015) *SAPL* 7-8.

unlawful occupation of Modderklip's property is regarded as "incongruent with legally secure tenure and therefore unacceptable"[813] and courts cannot be allowed to support such a position.

Furthermore, constitutional damages are paid out of state funds comprised out of the taxpayer's money. Accordingly, while it may be the State who is held accountable by the court, it is the taxpayer who effectively pays the bill and rights the constitutional infringement.[814] Therefore, it can be argued that the State effectively escapes and delegates its liability onto the taxpayer, without addressing the real problem – the provision of tenure security and adequate housing as envisaged by the Constitution.[815] Moreover, state funds can be otherwise utilised more effectively to cater for the provision of land and adequate housing. In this regard, it would seem as if the money used to compensate one person, can be used more efficiently to accommodate the poor.

Therefore, at first glance, it may seem as if the outcome in *Modderklip CC* realised the rights of both the land owner and the unlawful occupiers. However, the outcome did not guarantee long term secure tenure for the unlawful occupiers.[816] Therefore, upon further evaluation of the order given in *Modderklip CC*, it cannot be said that the unlawful occupiers' rights to land and adequate housing were effectively realised,[817] because their tenure remains illegal and uncertain.[818] In this regard, Strydom and Viljoen argue that the expropriation of the property for housing purposes would have constituted a more suitable remedy in the circumstances.[819] An expropriation would have enabled the State to acquire the land and provide permanent land and adequate housing to the unlawful occupiers which in turn, would have provided for greater tenure security and certainty.[820] Furthermore, it is evident from *Modderklip CC* that some State expenditure would have been inevitable, regardless of whether an eviction order was executed or not. If the eviction order that was granted in *Modderklip HC* was executed, State expenditure would have been required to relocate and provide

[813] Viljoen (2015) *SAPL* 69-70.
[814] Batchelor *Constitutional Damages for the Infringement of a Social Assistance Right in South Africa* 128.
[815] Sections 25(6) and 26(1) of the Constitution of the Republic of South Africa, 1996.
[816] Viljoen (2015) *SAPL* 69-70; Pienaar (2015) *SAPL* 7-8.
[817] Sections 25(5) and 26(1) of the Constitution of the Republic of South Africa, 1996 respectively.
[818] Viljoen (2015) *SAPL* 69-70; Pienaar (2015) *SAPL* 7-8.
[819] Strydom and Viljoen (2014) *PELJ* 1234; Viljoen (2015) *SAPL* 67.
[820] Viljoen (2015) *SAPL* 67.

alternative accommodation to the evictees in due course.[821] However, if the court had declined to order an eviction order, the State could have expropriated the property which would require the State to pay compensation to the land owner for the continuous and unlawful occupation of his land in terms of the Expropriation Act.

In light of monetary considerations, it may also be beneficial to consider whether German equalisation measures, known as *Ausgleich*, would have constituted a more suitable and effective remedy in *Modderklip CC*. In this regard, Van der Walt explains that the constitutional damages order in *Modderklip CC* can be compared to *Ausgleich*.[822] However, these equalisation measures are neither compensation orders for the expropriation of property, nor are they delictual damages. Instead, *Ausgleich* can be regarded as a payment of money to lessen the disproportionate burden imposed by legislation on ownership rights.[823] Essentially, the equalisation payment seeks to alleviate the burden imposed by statutory regulations. This prevents an otherwise legitimate and lawful regulation of property from being excessive, unconstitutional or invalid.[824] Importantly, equalisation payments differ from constitutional damages. Equalisation payments are awarded in terms of specific authorising legislation[825] whereas constitutional damages are awarded in terms of the common law or by relying on the Constitution, as explained above.[826]

Although constitutional damages or *Ausgleich* may provide a quick solution to the land owner without uprooting the unlawful occupiers, neither solution ensures *long term secure tenure* for the unlawful occupiers. Accordingly, it cannot be said that either option would have ensured the realisation of effective relief in *Modderklip CC.*

4 2 4 Modderklip: An example of sharing?

In light of the discussion of constitutional damages above and the concern whether effective relief was or could have been granted, the particular facts and circumstances

[821] Viljoen (2015) *SAPL* 67.
[822] Van der Walt *Constitutional Property Law* 366-367 and 277-280; Strydom *A hundred years of demolition orders* 350.
[823] Van der Walt *Constitutional Property Law* 366-367; Strydom *A hundred years of demolition orders* 350-351.
[824] Van der Walt *Constitutional Property Law* 277-280; Strydom *A hundred years of demolition orders* 329.
[825] Van der Walt *Constitutional Property Law* 277-280, 367; Stydom *A hundred years of demolition orders* 329, 350-351.
[826] Bishop “Remedies” in *CLOSA* 9-151.

of the Modderklip scenario also warrants a further possible perspective. In this regard, the work of Dyal-Chand becomes relevant. Having regard to the issue of effective relief within the context of damages and possible compensation, Dyal-Chand promotes the concept of "sharing".[827] It is set out here briefly because it relays to the current South African approach where constitutional damages are concerned.

Dyal-Chand proposes that the concept of "sharing"[828] could form the basis for a more just and appropriate outcome in property law disputes.[829] In this regard, she considers sharing in light of the interest-outcome approach which she describes as:

> "…a means of resolving property law disputes where more than one legitimate interest exists, concerning use, possession, or access to a piece of property and where such interests are represented in the form of conflicting positions concerning the property."[830]

Practically, the approach proposes three steps for courts to follow in the resolution of property disputes.

Firstly, the court has to determine the "legitimate interests on both sides of the dispute".[831] In this regard the court has to establish each party's *interests* pertaining to the property.[832] Accordingly, at this stage of the approach, the court should refrain from taking into account who has ownership of the property or land in question. [833] Instead, the court should consider the actual and intended use of the property.[834] Considerations such as the subjective needs of the parties and the moral ties to the property or land in question should be regarded as factors in determining the legitimate interests of the parties.[835] This step enables the court to gather the necessary information pertaining to the needs and intentions of the parties and guides the court in finding a just and appropriate outcome.[836]

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[827] Dyal-Chand (2013) *Connecticut LR* 647-723 647.
[828] Dyal-Chand (2013) *Connecticut LR* 647.
[829] Dyal-Chand (2013) *Connecticut LR* 655-656.
[830] Dyal-Chand (2013) *Connecticut LR* 677.
[831] Dyal-Chand (2013) *Connecticut LR* 677.
[832] Dyal-Chand (2013) *Connecticut LR* 677.
[833] Dyal-Chand (2013) *Connecticut LR* 677.
[834] Dyal-Chand (2013) *Connecticut LR* 707-708.
[835] Dyal-Chand (2013) *Connecticut LR* 707-708.
[836] Dyal-Chand (2013) *Connecticut LR* 708.

Secondly, the court would be required to consider outcomes that could best serve each party's legitimate interests.[837] In this regard, the court will try to find an outcome that will realise the needs of the parties. At this stage of the three step approach Dyal-Chand emphasises that *use*, should not only be regarded as one of the factors to be considered in finding a just an appropriate outcome, but also as an outcome in and of itself.[838] Ideally, solutions should be created which encompass shared use of the property that could satisfy the needs and interests of the parties involved in the dispute.[839]

Thirdly and lastly, ownership and other formal entitlements should be considered and evaluated to "the extent to which they are relevant to a given dispute".[840] In this regard, Dyal-Chand highlights that the most important feature of "sharing" under the interest-outcome approach, is that it "results in outcomes that represent compromises of some sort between the parties' varying interests".[841]

Although the Supreme Court of Appeal and the Constitutional Court in *Modderklip SCA* and *Modderklip CC* did not expressly follow the interest-outcome approach, the outcome of the cases can be viewed as an example of property sharing. The court in *Modderklip SCA* and *Modderklip CC*, in line with the *PE Municipality* case,[842] took into consideration the competing interests of the land owner and the unlawful occupiers respectively.[843] This is in line with step one and three of the interest-outcome approach, because the court not only considers the subjective needs and interests of the unlawful occupiers but also takes the ownership of the land or property into consideration. Furthermore, the fact that the court alluded to expropriation as an outcome that could best serve the rights and interests of both parties, is in line with step two of the interest-outcome approach. However, because the court does not have the authority to order the State to expropriate the property it ordered that direct constitutional damages should be paid to the land owner. This outcome had the advantage of compensating the land owner for the indefinite occupation of his

[837] Dyal-Chand (2013) *Connecticut LR* 677.
[838] Dyal-Chand (2013) *Connecticut LR* 711.
[839] Dyal-Chand (2013) *Connecticut LR* 647-723.
[840] Dyal-Chand (2013) *Connecticut LR* 677.
[841] Dyal-Chand (2013) *Connecticut LR* 648.
[842] *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) paras 37, 43.
[843] *Modder East Squatters v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa v Modderklip Boerdery* 2004 3 All SA 169 (SCA) para 52.

property, while enabling the unlawful occupiers to remain on the property until the State could provide alternative accommodation and legally secure tenure to the unlawful occupiers. In this regard, the court also considered *use* of the property by the unlawful occupiers as an *outcome* to the case and not only as a *factor* for determining whether it would be just and equitable for the unlawful occupiers to remain on the property.

Accordingly, the interest-outcome approach, in line with the concept of sharing, may provide a different *approach* to solving property disputes and finding an effective remedy in the context of evictions in general. At this point in time, this particular approach has not yet been followed in South Africa in the eviction context. However, it can be envisaged that the interest-outcome approach may be a viable method of finding or forging effective relief.[844]

4 2 5 Comparing the Modderklip scenario to the Blue Moonlight saga

The question whether constitutional damages would be appropriate and effective relief emerged again in the *Blue Moonlight* saga.[845] In *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue* ("Blue Moonlight HC"),[846] the High Court ordered the State to pay the property owner an amount equivalent to the fair and reasonable monthly rental for the use of the premises by the unlawful occupiers.[847] In this regard, the payment of rent can arguably be viewed as constitutional damages.[848] The court also found that the State's housing policy was unconstitutional, thereby ordering the State to remedy its housing policy and report back to it accordingly.[849]

However, an appeal was lodged by the State against the abovementioned order. In *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* ("Blue Moonlight SCA"),[850] the Supreme Court of Appeal set aside the order for

[844] *Fose v Minister of Safety and Security* 1997 7 BCLR (CC) para 69; Bishop "Remedies" in *CLOSA* 9-65-9-78; Mbazira *Strategies for effective implementation* 5 read with Dyal-Chand (2013) *Connecticut LR* 677.
[845] Pienaar *Land Reform* 773.
[846] *Blue Moonlight Properties 39 (Pty) Ltd v The Occupiers of Saratoga Avenue* 2009 1 SA 470 (W).
[847] Pienaar *Land Reform* 744; Chenwi (2010) *ESR Review* 9.
[848] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* (2011) 4 SA 337 (SCA) para 70.
[849] Pienaar *Land Reform* 774-775.
[850] 2011 4 SA 337 (SCA); Tissington & Wilson (2011) *ESR Review* 3-6; Dickinson (2011) *SAJHR* 466-495; Kruuse (2011) *SALJ* 620-632; and Dickinson (2013) *SALJ* 554-596.

constitutional damages in the form of a monthly rental, on the basis of the distinguishing facts of the present case and the *Modderklip CC* case. The court distinguished the present case from that of the *Modderklip CC* case on four grounds.[851]

Firstly, in the *Modderklip CC* case the compensation order was made only *after* an eviction order was granted but not executed, whereas the compensation order in *Blue Moonlight SCA* was *ancillary* to an eviction order. Secondly, the award in *Modderklip CC* was made because the State had violated the land owner's right by not assisting in the execution of the court order. However, in *Blue Moonlight SCA* there was no eviction order that needed to be executed. Accordingly, the State in *Blue Moonlight SCA* did not infringe the property owner's constitutional right to have access to courts. Thirdly, due to the large number of unlawful occupiers on Modderklip's farm, it was practically impossible to execute the eviction order. In *Blue Moonlight* however, the number of unlawful occupiers did not even amount to a hundred at the time of applying to the High Court. It would have been impractical to evict the people and provide alternative accommodation had an eviction order been granted, regardless of whether the State's housing policy was indeed reasonable.[852] Lastly, the land owner in *Modderklip CC* experienced an unlawful land invasion despite taking all reasonable steps expeditiously to safeguard his interests. By way of contrast, Blue Moonlight purchased the property knowing that it had to evict the occupiers before redeveloping the land. There was also a delay on the part of Blue Moonlight in instituting eviction proceedings.

On the facts, these two cases were thus clearly distinguishable. In terms of the general approach for determining whether constitutional damages would be appropriate relief, the plaintiff could not establish that it would be "appropriate and just" to award direct constitutional damages in this case. The Supreme Court of Appeal in *Blue Moonlight* accordingly held that constitutional damages would not constitute appropriate relief.

The Constitutional Court in *City of Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* ("Blue Moonlight CC") [853] essentially confirmed the order of the

[851] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2011 4 SA 337 (SCA) paras 70-71.
[852] Chenwi (2010) *ESR Review* 9.
[853] 2012 2 SA 104 (CC). See also Tissington & Wilson (2011) E*SR Review* 3-6; Dickinson (2011) *SAJHR* 466-495; Kruuse (2011) *SALJ* 620-632; and Dickinson (2013) *SALJ* 554-596.

Supreme Court of Appeal, while highlighting the unconstitutionality of the State's Housing Policy.[854] However, more than a year later it became abundantly clear that the State had not progressed at all with respect to the housing crisis of the unlawful occupiers.

Given these conditions, the land owner averred that it could not wait indefinitely to regain possession of its property.[855] This led to the subsequent judgment *Hlophe v The City of Johannesburg Metropolitan Municipality*.[856] The court held that the State had not absorbed the import of the various judgments;[857] that it did not comprehend its role concerning the provision of alternative accommodation to the occupiers and that it had consequently disregarded the order of the Constitutional Court.[858] In this regard the court stipulated a fixed period of time for the State to take the necessary administrative and other steps necessary to ensure that it complied with the previous order handed down.[859] Importantly, in the event of further non-compliance the land owner would be able to bring an application for contempt of court or claim constitutional damages from the State.[860] While the matter of constitutional damages was dealt with in this Chapter, contempt of court proceedings is explored in the next Chapter.

5 Reflection

The single-system-of-law concept[861] and subsidiarity principles[862] dictate that a claimant seeking to vindicate his/her constitutional rights, must first rely on legislation enacted to protect those constitutional rights in question, before relying on the common law or the Constitution.[863] Accordingly, a land owner seeking to vindicate his

[854] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2011 4 SA 337 (SCA) para 104.
[855] Pienaar *Land Reform* 775.
[856] 2013 4 SA 212 (GSJ).
[857] *Hlophe v The City of Johannesburg Metropolitan Municipality* 2013 4 SA 212 (GSJ) para 10.
[858] Pienaar *Land Reform* 775-776.
[859] See para 3 of the order of the court in *Hlophe v The City of Johannesburg Metropolitan Municipality* 2013 4 SA 212 (GSJ).
[860] Pienaar *Land Reform* 776.
[861] *Ex Parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa* 2000 2 SA 674 (CC) para 44; Van der Walt *Property and Constitution* 19-20; Van der Walt (2008) *CCR* 77.
[862] Van der Walt *Property and Constitution* 36, 40-43, 81-91.
[863] Van der Walt *Property and Constitution* 23-24, 35. These principles provide guidance when dealing with more than one potentially applicable source of law and ensure selection of the source of law that will contribute to the development of a single system of law. See also Van der Walt *Property and Constitution*. See Chapter 2 in general.

or her right not to be arbitrarily deprived of his or her property[864] must first rely on the provisions of PIE before relying on the law of delict or the Constitution.[865] However, PIE does not provide for a compensatory mechanism which the land owner can rely on to vindicate his or her section 25(1) right. Accordingly, the land owner will have to determine whether he or she has a delictual claim in terms of the common law before relying directly on the Constitution. As mentioned above,[866] it is not likely that a court will award delictual damages to a land owner suffering financial loss due to the deprivation of his or her property by way of unlawful occupation.[867] The element of wrongfulness may also be problematic to succeed with a claim for delictual damages, because not every breach of a constitutional duty is equivalent to unlawfulness in the delictual sense and therefore not every breach of a constitutional obligation[868] constitutes unlawful conduct. [869]

Accordingly, in the absence of a compensatory mechanism in PIE and the unlikelihood of a court awarding delictual damages for the failure by the State to execute an eviction order, a land owner could claim direct constitutional damages.

Thus far, the courts have used their own discretion, coupled with the listed factors in *Kate*[870] to determine whether constitutional damages will be appropriate. In the absence of an overarching framework for determining whether direct constitutional damages will be appropriate in a particular case, reference is made to the framework as proposed and used by the Canadian court in *Ward*. The court in *Ward* establishes an approach whereby the South African courts can determine whether an award of

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[864] Section 25(1) of the Constitution of the Republic of South Africa, 1996; *First National Bank of South Africa Ltd t/a Wesbank v Commissioner South African Revenue Service; First National Bank of South Africa Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC); Van der Walt *Constitutional Property Law* 190-333; Roux "Property" in *CLOSA* 46-17-46-28; Strydom & Viljoen (Maass) (2014) *PELJ* 1207 1220, 1222-1223, 1231-1235.

[865] Van der Walt *Property and Constitution* 36, 40-43, 81-91.

[866] See 2 2 above.

[867] Bishop "Remedies" in *CLOSA* 9-154. See *Olitzki Property Holdings v State Tender Board* 2001 3 SA 1247 (SCA); *Premier of the Province of the Western Cape v Fair Cape Property Developers (Pty) Ltd* 2003 6 SA 13 (SCA); *Steenkamp v Provincial Tender Board of the Eastern Cape* 2007 3 BCLR 300 (CC) where courts have refused to develop common law administrative principles to provide for compensation where the constitutional right to administrative justice has been infringed.

[868] Section 26(2) of the Constitution of the Republic of South Africa, 1996. See in general *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC); Liebenberg *Socio-Economic Rights* 344-351; McLean "Housing" in *CLOSA* 55-8-55-14.

[869] *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 3 BCLR 300 (CC) paras 37-40.

[870] *MEC for the Department of Welfare v Kate* 2006 4 SA 478 (SCA) para 25.

direct constitutional damages will be appropriate in a particular case. In this regard, the factors laid down in *Kate* will serve an important role in determining whether it would be "appropriate and just" to award direct constitutional damages. This approach seems to be in line with the outcomes of the *Modderklip CC* and *Blue Moonlight SCA* decisions and could therefore be adopted by the South African courts. The adoption of a general framework for direct constitutional damages will provide certainty regarding the onus on each particular party and the implications thereof. The land owner claiming direct constitutional damages must prove that there has been a breach of his or her constitutional right to property and/or access to courts and establish that it would be appropriate and just to award direct constitutional damages. In this regard, the land owner may use the factors listed in *Kate* and circumstances specific to the case to show why it would be appropriate to award direct constitutional damages. Once these steps have been proved, a *prima facie* case is established against the State. In this regard, the onus shifts onto the State who must then provide the court with countervailing factors that will prove that it will be inappropriate to award constitutional damages.

What is evident from the *Modderklip* cases is that the award for constitutional damages provided effective relief to the land owner. However, it is questionable whether the court effectively vindicated the rights of the unlawful occupiers. In order to effectively vindicate the rights of the unlawful occupiers, the State must provide access to land and housing, in accordance with its constitutional obligations. This necessitates that the State must provide services and devise legally secure tenure to the unlawful occupiers.[871] Accordingly, even though the unlawful occupiers were permitted to remain on the property until the State could provide alternative land and accommodation, their occupation and tenure remained unlawful and insecure.[872] Accordingly, the court in *Modderklip CC* should have placed a positive duty on the State to provide services and devise *legally* secure tenure to the unlawful occupiers.[873] In the absence of legally secure tenure the vindication of the rights of the unlawful occupiers will remain ineffective.

[871] Viljoen (2015) *SAPL* 46-47; Pienaar (2015) *SAPL* 7-8; and Van Wyk (2005) *Stell LR* 466-487.
[872] Viljoen (2015) *SAPL* 46-47; Pienaar (2015) *SAPL* 7-8; and Van Wyk (2005) *Stell LR* 466-487.
[873] Viljoen (2015) *SAPL* 46-47; Pienaar (2015) *SAPL* 7-8; and Van Wyk (2005) *Stell LR* 466-487.

It is within this context where the particular facts and circumstances of *Modderklip CC* raise other possibilities that could possibly provide effective relief for both parties. In this regard, (a) expropriation as proposed by Viljoen and Strydom;[874] (b) *Ausgleich*, also known as "equalisation measures";[875] and (c) "sharing"[876] postulated by Dyal-Chand, may provide effective relief for both the land owner and the unlawful occupier(s).

Expropriation of the property would have allowed the State to acquire the land for a public purpose or a benefit in return for the payment of compensation. The provision of permanent land and adequate housing by way of expropriation, would arguably have realised the rights if the unlawful occupiers.[877] On the other hand, the land owner would be compensated for the loss and infringement of his or her property rights.

Although *Ausgleich* is similar to direct constitutional damages, the two forms of compensation differ. Constitutional damages are damages awarded in terms of the Constitution,[878] whereas equalisation measures or payments are awarded in terms of specific authorising legislation[879] which imposes a disproportionate burden on ownership rights.[880] While both equalisation payments and direct constitutional damages compensate the land owner, neither of these forms of compensation give effect to the unlawful occupiers' rights. Accordingly, neither direct constitutional damages, nor *Ausgleich* provide effective relief to the unlawful occupiers. The unlawful occupiers' tenure and right to housing remain unrealised.

Dyal-Chand promotes "sharing" as a way of solving complex property disputes. Sharing, coupled with the interest-outcome approach, can be particularly useful in

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[874] Strydom & Viljoen (Maass) (2014) *PELJ* 1234; Viljoen (2015) *SAPL* 67.
[875] Van der Walt *Constitutional Property Law* 366-367 and 277-280; Strydom *A hundred years of demolition orders* 350.
[876] Dyal-Chand (2013) *Connecticut LR* 647-723 in general.
[877] Section 25(5) read with sections 26(1) and 26(3) of the Constitution of the Republic of South Africa, 1996. See in general Van Wyk (2005) *Stell LR* 466-487; *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC); Liebenberg *Socio-Economic Rights* 344-351; Muller *The impact of section 26 of the Constitution* 75-82, 93-99; McLean "Housing" in *CLOSA* 55-8-55-14.
[878] Bishop "Remedies" in *CLOSA* 9-151. See 2 above.
[879] Van der Walt *Constitutional Property Law* 277-280, 367; Stydom *A hundred years of demolition orders* 329, 350-351.
[880] Van der Walt *Constitutional Property Law* 366-367; Strydom *A hundred years of demolition orders* 350-351; Strydom & Viljoen (Maass) (2014) *PELJ* 1234.

cases where the facts, rights and interests of the respective parties and the circumstances of the case are complex in nature. One of the reasons direct constitutional damages was awarded in *Modderklip CC*, was precisely because of the difficulty of resolving the conflicting rights of the land owner and the unlawful occupiers. In terms of the interest-outcome approach an outcome and/or remedy is sought that will accommodate both the land owner and the unlawful occupiers. Such an outcome or remedy does not necessarily provide for compensation. Accordingly, the South African courts can use this approach in order to find a solution that will realise the rights of all the parties involved in an eviction case.[881] This approach can also be used to find an effective remedy in cases where there was a failure to execute an eviction order. In this regard, the steps that the courts have to follow in terms of the interest-outcome approach, aim to find an outcome (remedy) that would best serve each party's legitimate interests, without the disadvantages linked to the payment of damages.

6 Conclusion

Indirect and direct constitutional damages may potentially provide effective relief to parties involved in the execution of court orders, including eviction orders. In this regard, a litigant must first determine whether he or she has a claim for indirect constitutional damages in terms of statute.[882] As stated above, PIE does not provide for a compensatory measure to vindicate a land owner's property rights. Where a statute, such as PIE, does not provide for compensation, the land owner must then determine whether he or she has a claim for damages based on the common law. However, there are certain difficulties that arise where a land owner relies on the common law of delict to vindicate his or her property rights. In this regard, the Constitutional Court has stated that a breach of a constitutional duty[883] is not wrongful in the delictual sense for that reason alone. In addition, it must be reasonable to compensate the land owner for his loss.[884] This would entail proving that the State has

[881] Dyal-Chand (2013) *Connecticut LR* 677.
[882] Van der Walt *Property and Constitution* 35; *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) para 67. See also *Ex Parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa* 2000 2 SA 674 (CC) para 44; Van der Walt *Property and Constitution* 19-20, 36, 40-43, 81-91 read together; and Van der Walt (2008) *CCR* 77.
[883] Section 34 and effectively section 25 of the Constitution of the Republic of South Africa, 1996.
[884] *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 3 BCLR 300 (CC) paras 37-40.

acted in bad faith or under corrupt circumstances or completely outside the legitimate scope of the empowering provision.[885] Proving that the State had acted negligently in exercising its constitutional duties[886] will therefore not be sufficient to justify awarding indirect constitutional damages. Accordingly, a land owner will have to rely on direct constitutional damages in cases where the common law of delict is not available to vindicate his or her property rights or where no statute provides for relevant compensation.[887]

Cases where a land owner has relied on direct constitutional damages to vindicate his or her property rights are extremely rare.[888] Thus far, *Modderklip CC* has been the only case in the context of evictions where constitutional damages have been awarded. Therefore, it is proposed that a general framework for direct constitutional damages be developed which provides for the effective and direct vindication of constitutional rights infringed by the State, subject to the single-system-of-law concept and subsidiarity principles.[889] It is averred that a general framework for direct constitutional damages may provide clarity with regard to when it will be appropriate to award direct constitutional damages. In this regard, the four step approach laid down in *Ward* could be utilised by the South African courts.

In this regard, the factors set out in *Kate* can be utilised to determine whether it will be appropriate to order constitutional damages in a given case.[890] Accordingly, the court must have regard to the nature and relative importance of the right; the consequences of the infringement of the right and whether alternative remedies might be available to assert and vindicate the rights in question.[891] Other case-specific circumstances may also be considered by the court.

It is apparent from the case law discussed above that all other forms of remedies, in terms of statute or the common law, must first be exhausted before direct constitutional damages may be awarded or relied on. This is in line with the methodology required by the single-system-of-law concept and subsidiarity principles. The extent of the

[885] *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 3 BCLR 300 (CC) para 55; Currie & De Waal *The Bill of Rights* 200.
[886] Section 34 read with section 164(5) of the Constitution of the Republic of South Africa, 1996.
[887] *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) paras 60, 67.
[888] Liebenberg *Socio-Economic Rights* 439, 442.
[889] Barns (2013) *Responsa Meridiana* 22.
[890] *MEC for the Department of Welfare v Kate* 2006 4 SA 478 (SCA) para 25.
[891] *MEC for the Department of Welfare v Kate* 2006 4 SA 478 (SCA) para 25.

deprivation or infringement will also be considered in determining whether it will be appropriate to award direct constitutional damages. Additionally, and at the very least, the land owner must have taken all reasonable steps necessary to vindicate his or her rights expeditiously.[892]

However, where neither the structural interdict, nor indirect or direct constitutional damages will constitute appropriate and effective relief, alternative relief must still be sought.[893]

[892] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2011 4 SA 337 (SCA) para 71 where the Supreme Court of Appeal distinguished *Blue Moonlight* from *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC); *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) para 31; Pienaar *Land Reform* 773, 775.

[893] Such alternative relief will be discussed in Chapter 4.

Chapter 4: Contempt of Court

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1 Introduction

Where litigants obtain a court order vindicating their right but there is a failure to execute the order, it cannot be said that the rights violations have been effectively remedied. A successful party is entitled to an order to the extent to which it can be made effective, even though it may not be possible to do so immediately.[894] It follows that a failure to execute an eviction order regarding residential property will not provide effect relief to parties involved in an eviction case.

In practice, court orders, such as eviction orders, can be difficult to enforce, not necessarily because State officials obdurately oppose the court's authority, but simply due to inattentiveness, incompetence or because State departments lack the capacity to fulfil them.[895]

One option available in ensuring that court orders are effectively implemented is civil contempt of court proceedings,[896] which form the focus of this Chapter. In this regard, a common law distinction is drawn between orders *ad factum praestandum* (mandatory orders compelling someone to do or to refrain from doing something) and orders *ad pecuniam solvendam* (for the payment of a sum of money).[897] The remedies available to enforce compliance with these different types of court orders differ, as set out below in more detail.[898]

Where the State fails to execute a structural interdict (an order *ad factum praestandum*) an applicant may approach the court for a contempt of court order. A court may also raise the issue of contempt of court *mero motu*.[899] Accordingly, the

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[894] AC Cilliers, C Loots & HC Nel *Herbstein and Van Winsen: The civil practice of the High Courts and the Supreme Court of Appeal in South Africa Volume 2* 5 ed (2009) 1104-1105.
[895] K Roach & G Budlender "Mandatory relief and supervisory jurisdiction: when is it appropriate, just and equitable?" (2005) 122 *SALJ* 325.
[896] Cilliers *et al The civil practice of the High Courts 2* 1100; *Fakie NO v CII Systems (Pty) Ltd* 2006 4 SA 326 (SCA) para 42; *Meadow Glen Home Owners Association v City of Tshwane Metropolitan Municipality and Another* 2015 1 All SA 299 (SCA) para 16. See in general R Roos "Statutory mechanisms to enforce judgment debts against the state: journal" (2005) 20 *SA Public Law* 167-175.
[897] Cilliers *et al The civil practice of the High Courts 2* 1098, 1106; S Liebenberg *Socio-Economic Rights: Adjudication under a transformative Constitution* (2010) 451. See in general Roos (2005) *SA Public Law* 167-175.
[898] NJJ Olivier & C Williams "State Liability for final orders sounding in money: At long last alignment with the Constitution" (2011) *Obiter* 489-520 493; Roos (2005) *SA Public Law* 167-175.
[899] *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* 2015 6 BCLR 711 (CC) para 2. However, the usual method of initiating such proceedings are by way of an application for the issue of a rule *nisi*. See Cillers *et al The civil practice of the High Courts 2* 1102-1193.

chapter begins with a discussion of orders *ad factum praestandum* in general and the necessary requirements as laid down in *Fakie NO v CII Systems (Pty) Ltd* ("Fakie")[900] which have to be proved for a court to award a contempt of court order. The discussion of orders *ad factum praestandum* in general is followed by a discussion and analysis of the Constitutional Court's judgment in *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* ("Pheko 2").[901] In *Pheko 2 the* court, out of its own accord, raised the issue of contempt of court after subsequent and continuous failures by the State to execute the structural interdict granted in *Pheko 1*. The evaluation of the court's order in *Pheko 2* highlights the importance of joinder and the role it can play in the eviction process. In this regard, joinder is often necessary for the obtainment of effective relief.

Where the State fails to pay constitutional damages (an order *ad pecuniam solvendam*), a judgment creditor can enforce the money judgment, by way of an application for a writ of execution, which will lead to the attachment of assets and consequential sale.[902] Accordingly, the discussion and analysis of *Pheko 2* is followed by a discussion of orders *ad pecuniam* solvendam in general. A distinction is forthwith drawn between the execution of orders *ad pecuniam solvendam* before and after the decision in *Nyathi v Member of the Executive Council for the Department of Health Gauteng* ("Nyathi 1").[903] The State Liability Amendment Act 14 of 2011, which was promulgated subsequent to the decision in *Nyathi 1*, now comprehensively regulates the procedure for enforcing money judgments and will accordingly be discussed.

2 Failure to enforce orders *ad factum praestandum*

Where a judgment debtor has been ordered to perform or refrain from doing something and that person or entity fails to do so, the judgment creditor can apply to court for an

[900] 2006 4 SA 326 (SCA).
[901] 2015 6 BCLR 711 (CC). See in general A du Plessis & A van den Berg "Some perspectives on constitutional conflict in local disaster management through the lens of *Pheko v Ekurhuleni Metropolitan Municipality* 2012 2 SA 598 (CC): case note" (2013) 28 *SAPL* 448-468; G Muller "Evicting unlawful occupiers for health and safety reasons in post-apartheid South Africa" (2015) 132 *SALJ* 616-638.
[902] Sections 61-79 of the Magistrate's Court Act 32 of 1944 and sections 36, 39 and 40 of the Supreme Court Act 59 of 1959; Roos (2005) *SA Public Law* 167-175.
[903] 2008 5 SA 94 (CC). See in general P de Vos "Between moral authority and formalism: *Nyathi v Member of Executive Council for the Department of Health, Gauteng*" (2009) 2 *CCR* 409-427; Olivier & Williams (2011) *Obiter* 489-520; S Bulbulia "Making the state pay for its misdeeds: the law" (2011) 11 *Without Prejudice* 36-38.

order declaring the judgment debtor to be in contempt of court.[904] Usually, an application for contempt of court is coupled with the request for an imposition of a sanction which has the object of inducing the non-complier to fulfil the terms of the previous order.[905] If all the requisites to establish contempt of court have been proved, the court may grant an order committing the judgment debtor to jail.[906]

In order to succeed with an application for civil contempt of court, the applicant must prove the following requisites beyond reasonable doubt. Firstly, the applicant must be able to prove the existence of a previously obtained court order.[907] Secondly, the applicant must be able to prove that the order has been duly served on, or brought to the notice of the alleged contemnor.[908] Lastly, the applicant must prove non-compliance with the particular court order.[909] Once the applicant has proved the abovementioned requisites beyond reasonable doubt, the respondent bears the evidential burden of proving that the non-compliance was not wilful and *mala fide*.[910] Ordinarily, a rule *nisi* is issued by the court calling upon the person or official to show cause why they should not be held in contempt before that person is committed to prison.[911] If the respondent fails to discharge this evidential burden then contempt will be established and the court may commit a person for contempt of court.

However, such a remedy has its limits, especially when it comes to its application in instances that involve public bodies being in non-compliance.[912] It is clear that the

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[904] Cilliers *et al The civil practice of the High Courts 2* 1103; Liebenberg *Socio-Economic Rights* 451.
[905] Cilliers *et al The civil practice of the High Courts 2* 1103.
[906] Cilliers *et al The civil practice of the High Courts 2* 1103.
[907] *Fakie NO v CCII Systems (Pty) Ltd* 2006 4 SA 326 (SCA) para 41. *Meadow Glen Home Owners Association v City of Tshwane Metropolitan Municipality* 2015 1 All SA 299 (SCA) para 16 and *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* 2015 6 BCLR 711 (CC) 36 confirm the position laid down in *Fakie*. See also Cillers *et al The civil practice of the High Courts 2* 1103.
[908] *Fakie NO v CCII Systems (Pty) Ltd* 2006 4 SA 326 (SCA) para 41; *Meadow Glen Home Owners Association v City of Tshwane Metropolitan Municipality* 2015 1 All SA 299 (SCA); *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* 2015 6 BCLR 711 (CC) para 36.
[909] Cilliers *et al The civil practice of the High Courts 2* 1103; *Fakie NO v CCII Systems (Pty) Ltd* 2006 4 SA 326 (SCA) para 41.
[910] *Fakie NO v CCII Systems (Pty) Ltd* 2006 4 SA 326 (SCA) para 42; Cillers *et al The civil practice of the High Courts 2* 1103. *City of Johannesburg Metropolitan Municipality v Hlophe* 2015 2 All SA 251 (SCA) para 24 where the court held that "if the functionaries address the provision of temporary shelter to the occupiers diligently and in good faith, they would not be guilty of contempt of court even if their efforts prove to be unsuccessful". For a discussion on the *Hlophe* case see B Ray "Courts, capacity and engagement: Lessons from *Hlophe v City of Johannesburg*: feature" (2013) 14 *ESR Review* 3-5; G Mirugi-Mukundi "Case Review - fundamental constitutional value of accountability requires municipal officials to obey court orders: feature" (2015) 16 *ESR Review* 7-8.
[911] Cilliers *et al The civil practice of the High Courts 2* 1103; Liebenberg *Socio-Economic Rights* 451.
[912] *City of Johannesburg Metropolitan Municipality v Hlophe* 2015 2 All SA 251 (SCA) paras 22 and 24.

incarceration of state officials, acting as employees of the State, would be highly problematic.[913] Although noting that a State official who is ordered by a court to do or to refrain from doing a particular act, and fails to do so, is liable to be committed for contempt,[914] the court in *Meadow Glen Home Owners Association v City of Tshwane Metropolitan Municipality* ("Meadow Glen")[915] emphasised that such an order can only be granted in respect of the relevant State official that had the duty to perform a task and has wilfully failed to do so.[916] In this case, various home owner's associations tried to enlist the Municipality's help in controlling the expansion of an informal settlement in their neighbourhood. Various court applications and orders later, the court in *Meadow Glen* dealt with an attempt by the associations to incarcerate an official within the Municipality as a scapegoat for the failure to implement the previously obtained court order.[917] Although the court found that there was no doubt that a public official who is ordered by a court to do or to refrain from doing a particular act, and fails to do so, is liable to be committed for contempt, Mr Fenyani, the Director of Housing Resource Management, was only responsible for seeing to the maintenance of the fence and the provision of basic services.[918] Accordingly, it would be inappropriate to commit him to prison for the inadequacies in the Municipality's compliance with the court order. Instead, the court found that the Municipal Manager, (as far as the officials of the Municipality are concerned), was the responsible person tasked with overseeing the execution of court orders against the Municipality.[919] This official cannot pass

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[913] *Meadow Glen Home Owners Association v City of Tshwane Metropolitan Municipality* 2015 1 All SA 299 (SCA) para 20.

[914] *MEC for the Department of Welfare v Kate* 2006 4 SA 478 (SCA) para 30 where the court held as follow: "It goes without saying that a public functionary who fails to fulfil an obligation that is imposed upon him or her by law is open to proceedings for a *mandamus* compelling him to do so. That remedy lies against the functionary upon whom the statue imposes the obligation, and not against the provincial government"; *Meadow Glen Home Owners Association v City of Tshwane Metropolitan Municipality* 2015 1 All SA 299 (SCA) paras 20-22 and 30.

[915] 2015 1 All SA 299 (SCA).

[916] *Meadow Glen Home Owners Association v City of Tshwane Metropolitan Municipality* 2015 1 All SA 299 (SCA) paras 20-22; 24; *City of Johannesburg Metropolitan Municipality v Hlophe* 2015 2 All SA 251 (SCA) paras 18-20 and 25.

[917] Contra *City of Johannesburg Metropolitan Municipality v Hlophe* 2015 2 All SA 251 (SCA) para 24 where the occupiers did not claim an order that the functionaries be committed for contempt of court. Instead, they aimed to obtain a *mandamus* that obliges the functionaries to fulfil their own statutory obligations and to take the steps necessary to ensure that the City provides temporary shelter to the occupiers.

[918] *Meadow Glen Home Owners Association v City of Tshwane Metropolitan Municipality* 2015 1 All SA 299 (SCA) para 21.

[919] *Meadow Glen Home Owners Association v City of Tshwane Metropolitan Municipality* 2015 1 All SA 299 (SCA) paras 23-24. The court in *City of Johannesburg Metropolitan Municipality v Hlophe* 2015 2 All SA 251 (SCA) paras 18-20 went further and identified the Executive Mayor, City Manager and Director of Housing as the functionaries statutorily obliged to ensure compliance with the court's orders.

responsibility for these administrative duties on to a manager or a director who is not directly accountable in terms of their duties. In this regard, the importance of joinder as a mechanism to ensure that particular State officials are aware of what is expected of them in terms of court orders is crucial to the obtainment of effective relief. Accordingly, where the correct State officials are joined to the proceedings, the official responsible for the execution of the initial or relevant court order may be held personally accountable and may be held in contempt of court.

However, in spite of the numerous court orders (stretching over a period of at least eight years) and the application for contempt of court and committal in *Meadow Glen*, the problems of neither the neighbouring private land owners, nor the unlawful occupiers had been solved. In this regard, the court opted for the use of a structural interdict, whereby the parties must find innovative methods and a workable solution to resolve the competing interests of the different factions of the community.[920] It is questionable whether the very remedy first utilised to ensure compliance will be effective at this stage of the litigation process. A further structural interdict may seem redundant at this point in time. However, the joinder of the correct accountable parties may ensure that the initial structural interdict is executed at this stage. Arguably, the court in *Meadow Glen* could have posed specific timelines within which the accountable State officials and other parties involved in the case, ought to find a workable solution, given the long history of the case. Where the correct cited accountable State officials further fail to adhere to the court order, contempt of court proceedings may be instituted afresh.

What is evident from *Meadow Glen* is that where a court finds a recalcitrant litigant to be possessed of malice, civil contempt remedies other than committal, such as declaratory relief, a *mandamus* demanding the contemnor to behave in a particular manner, a fine and any further orders that would have the effect of coercing compliance, may still be employed.[921]

See also a discussion of *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* 2015 6 BCLR 711 (CC) below at 3 1.

[920] *Meadow Glen Home Owners Association v City of Tshwane Metropolitan Municipality* 2015 1 All SA 299 (SCA) para 36.

[921] *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* 2015 6 BCLR 711 (CC) para 37; *Fakie NO v CCII Systems (Pty) Ltd* 2006 4 SA 326 (SCA) para 65.

3 The use of civil contempt of court in South African eviction case law

3 1 Pheko v Ekurhuleni Metropolitan Municipality (No 2)

3 1 1 Introduction

In *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* ("Pheko 2")[922] the court initiated contempt of court proceedings *mero motu* following a failure by the State to execute the court order obtained in *Pheko v Ekurhuleni Metropolitan Municipality (No 1)* ("Pheko 1").[923]

3 1 2 Background and facts of the case

The court in *Pheko 1*[924] found that the Municipality had violated the unlawful occupiers' rights to dignity and access to adequate housing, following their forced removal from and demolishment of their homes.[925] The court accordingly held that the Municipality had a duty to provide the unlawful occupiers of Bapsfontein Informal Settlement with suitable temporary accommodation and to engage meaningfully with them in order to identify alternative land.[926] In order to ensure that the Municipality met these obligations, the court decided that it would supervise the process by way of granting a structural interdict. As explained above,[927] the structural interdict imposed the obligation on the Municipality to report to court on the progress made in meeting their constitutional obligations and fulfilling the court order.[928] However, ever since the order was granted in *Pheko 1*, there had been continuous failures to report back to court on the progress made within the time schedule set out by the court, or at all.[929]

Accordingly, the issue before the court in *Pheko 2* was whether the Municipality and its attorney were in contempt of court for failing to comply with the court's orders in *Pheko 1*.

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[922] 2015 6 BCLR 711 (CC).
[923] 2012 2 SA 538 (CC), which is discussed in Chapter 2 at 4 4. See in general Du Plessis & Van den Berg (2013) *SAPL* 448-468; Muller (2015) *SALJ* 616-638 for a discussion of *Pheko 1*.
[924] See Chapter 2 at 4 4 above.
[925] See Chapter 2 at 4 4 3 above.
[926] *Pheko v Ekurhuleni Metopolitan Municipality (No 1)* 2012 2 SA 538 (CC) paras 50, 53.
[927] See Chapter 2 at 4 4 3.
[928] *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* 2015 6 BCLR 711 (CC) para 3.
[929] *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* 2015 6 BCLR 711 (CC) para 9.

3 1 3 The judgment and order of the court

As an opening statement the court eloquently reiterated that the rule of law requires that the authority of the court be upheld.[930] The Constitution not only demands that all persons, including organs of State, must comply with court orders, but also commands that no one may interfere with any order of a court.[931] In this regard "courts have the power to ensure that their decisions or orders are complied with by all".[932] Where there is a failure to execute court orders, the effectiveness thereof and the judicial authority of the court will be rendered a "mockery" and continual non-compliance with court orders will, inevitably, lead to a situation of constitutional crisis.[933] In order to give effect to the rights of a successful litigant and uphold judicial authority it is thus unsurprising that a court may raise the issue of civil contempt of court *mero motu*.[934]

Accordingly, the court in *Pheko 2* instructed the State, and its legal representative respectively, to show good cause why they should not be held in contempt of court for its failure to execute the supervisory order granted in *Pheko 1*.[935] In this regard, the court had to determine whether all the elements to establish contempt of court, as set out in *Fakie,* were present.[936] The court found that there is no doubt that the Municipality failed to comply with the court's order.[937] However, the service of the order upon the Municipality, an essential element of establishing contempt,[938] was wanting.[939] Although it has to be accepted that the Municipality's explanation may not be adequate, the undisputed evidence,[940] confirmed under oath by the Municipality's legal representative, that the Municipality was neither served with nor made aware of

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[930] *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* 2015 6 BCLR 711 (CC) para 1.
[931] Sections 165(1) and (3) of the Constitution of the Republic of South Africa, 1996; *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* 2015 6 BCLR 711 (CC) para 1.
[932] *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* 2015 6 BCLR 711 (CC) para 2. Sections 8, 13; 165 and 172 of the Constitution of the Republic of South Africa, 1996.
[933] *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* 2015 6 BCLR 711 (CC) paras 1, 26. See section 1(c) read with section 165 of the Constitution of the Republic of South Africa, 1996 in this regard.
[934] *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* 2015 6 BCLR 711 (CC) para 2.
[935] *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* 2015 6 BCLR 711 (CC) paras 4, 12.
[936] *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* 2015 6 BCLR 711 (CC) para 25; Cillers *et al The civil practice of the High Courts 2* 1307.
[937] *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* 2015 6 BCLR 711 (CC) paras 10-12. Similarly, the court in *City of Johannesburg Metropolitan Municipality v Hlophe* 2015 2 All SA 251 (SCA) paras 22 and 24 held that if the functionaries act diligently and in good faith, but they still fail to provide housing, they will not be held in contempt of court.
[938] *Fakie NO v CCII Systems (Pty) Ltd* 2006 4 SA 326 (SCA) para 42; Cilliers *et al The civil practice of the High Courts 2* 1102-1103.
[939] *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* 2015 6 BCLR 711 (CC) paras 39-40.
[940] *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* 2015 6 BCLR 711 (CC) para 41.

the court order, negates a finding that proper service was established. Furthermore, the court could not infer and establish that the non-compliance was wilful and *mala fide*.[941] Therefore, the Municipality had shown good cause why it should not be held in contempt.

Regarding the attorney who was dealing with the matter, the court found that he did not inform the Municipality of the order because he had not received it.[942] The reason for not receiving the court order was because his facsimile number was no longer linked to his email address after it was changed.[943] It followed that the inference of wilfulness and *mala fides* could not be drawn. Therefore, contempt of court on the part of the attorney had not been established.[944] While the evidence did not establish wilfulness or *mala fides* on the part of the attorney, the court nevertheless found that the attorney displayed a gross disregard for his professional responsibilities.[945] The court held that the attorney, at the very least, had an obligation to notify his clients and the registrar of the court of any change of address. Failure to notify the registrar of such a change constituted gross negligence on his part.[946] Therefore, the court granted a cost order *de bonis propriis* (out of own pocket) against the attorney.[947]

While the courts do not countenance disobedience of judicial authority, it needs to be stressed that contempt of court does not exist out of mere disobedience of a court order, but out of the contumacious disrespect for judicial authority.[948] Absent service or notice of the court order as well as *mala fides* and wilfulness as elements required to establish contempt of court, the court had no choice but to find that the State was not in contempt of court.[949]

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[941] *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* 2015 6 BCLR 711 (CC) para 43.
[942] *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* 2015 6 BCLR 711 (CC)) para 47.
[943] *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* 2015 6 BCLR 711 (CC) para 49.
[944] *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* 2015 6 BCLR 711 (CC) para 50.
[945] *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* 2015 6 BCLR 711 (CC) para 54.
[946] *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* 2015 6 BCLR 711 (CC) para 54.
[947] *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* 2015 6 BCLR 711 (CC) para 55; Liebenberg *Socio-Economic Rights* 456 where she states that: "A cost order, as a form of penalty, can be regarded as a method for the court to express their displeasure in the actions of a particular party". See also C Plasket "Protecting the public purse: Appropriate relief and cost orders against State officials" (2000) 117 *SALJ* 151-158.
[948] *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* 2015 6 BCLR 711 (CC) para 42.
[949] *Fakie NO v CCII Systems (Pty) Ltd* 2006 4 SA 326 (SCA) para 42.

The fact that the Municipality was found not to be in contempt of court, does not detract from the fact that there has been a breach of their constitutional[950] and statutory obligations.[951] These obligations continue to form part of the Municipality's ongoing responsibility towards the unlawful occupiers of Bapsfontein.[952]

By virtue of their constitutional and statutory obligations, the court found that the Executive Mayor and the Municipal Manager are the State officials responsible for overseeing and managing the provision of services by Municipalities to local communities such as the Bapsfontein settlement.[953] In addition to these statutory responsibilities, the Municipal Manager is also tasked with the implementation of national and provincial legislation applicable to the Municipality.[954] Importantly, the Municipal Manager is also the person to be held accountable for overseeing and ensuring the execution of court orders.[955] As the accounting officer, he or she is in a position to determine what is feasible and what is not in terms of the court order.[956]

Furthermore, the Member of the Executive for the Gauteng Department for Human Settlements is also statutorily obliged to take all reasonable and necessary measures to support and strengthen the capacity of the Municipality in its provision of adequate housing.[957] When the Municipality fails in its obligation to provide adequate housing, the MEC is obliged to intervene by taking appropriate steps.[958]

Together, these State officials are responsible for the execution of eviction orders. It is precisely because of the leadership entrusted to these State officials that they have

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[950] Sections 152; 26 and 165(4) of the Constitution of the Republic of South Africa, 1996; *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* 2015 6 BCLR 711 (CC) para 44.
[951] Section 73 of the Local Government: Municipal Systems Act 32 of 2000, read with section 9(1) of the Housing Act 107 of 1997.
[952] *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* 2015 6 BCLR 711 (CC) para 46 read with the order in *Pheko v Ekurhuleni Metropolitan Municipality (No 1)* 2012 2 SA 598 (CC) paras 49-50.
[953]Section 56(3) of the Local Government: Municipal Structures Act 117 of 1998 and section 55(1)(d) of the Local Government: Municipal Systems Act 32 of 2000 respectively; *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* 2015 6 BCLR 711 (CC) para 59; *Meadow Glen Home Owners Association v City of Tshwane Metropolitan Municipality* 2015 1 All SA 299 (SCA) paras 23-24; *City of Johannesburg Metropolitan Municipality v Hlophe* 2015 2 All SA 251 (SCA) paras 18-20.
[954] Section 55(1)(p) of the Local Government: Municipal Systems Act 32 of 2000.
[955] Section 82 read with sections 56(3); 54A; 55 and 60 of the Local Government: Municipal Systems Act 32 of 2000; *Meadow Glen Home Owners Association v City of Tshwane Metropolitan Municipality and Another* 2015 1 All SA 299 (SCA) para 24.
[956] *Meadow Glen Home Owners Association v City of Tshwane Metropolitan Municipality and Another* 2015 1 All SA 299 (SCA) para 24.
[957] Sections 7 and 9 of the Housing Act 107 of 1997.
[958] Section 7(2)(f) of the Housing Act 107 of 1997 read with section 139 of the Constitution of the Republic of South Africa, 1996.

a duty to undertake responsibility by implementing court orders.[959] This does not mean that they have to be involved with the minutiae of executing an order and overseeing the practicalities of its realisation, but they must at least ensure that the municipal structures, for which they ultimately carry the legal and moral responsibility, respond appropriately. These State officials owe it to the courts and the unlawful occupiers, who depend on their diligent and expeditious exercise of power.[960]

For the purpose of implementing the court's supervisory order, and in light of the constitutional and statutory obligations of the relevant State officials, the court determined that the Executive Mayor, Municipal Manager and Head of the Department for Human Settlements as well as the Member of the Executive Council for Gauteng Department for Human Settlements, be joined to the proceedings.[961]

3 1 4 Evaluation of the order granted

Joinder will constitute one way of boosting compliance with court orders and ensuring accountability of individual State officials responsible for executing court orders.[962]

In *Sailing Queen Investments v The Occupants La Colleen Court*[963] the court held that the interests of the unlawful occupiers, private land owner and the State would be protected if the State is joined to the proceedings, because the State has a duty to

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[959] *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* 2015 6 BCLR 711 (CC) paras 59, 63. Sections 152 and 156 read with Schedule 4, Part A of the Constitution of the Republic of South Africa, 1996.
[960] *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* 2015 6 BCLR 711 (CC) para 64.
[961] *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* 2015 6 BCLR 711 (CC) paras 58-60.
[962] *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* 2015 6 BCLR 711 (CC) para 14; *Meadow Glen Home Owners Association v City of Tshwane Metropolitan Municipality and Another* 2015 1 All SA 299 (SCA) para 31; S Liebenberg & G Muller "Developing the law of joinder in the context of evictions of people from their homes" (2013) 29 *SAJHR* 554 555-557; 569-570. See G Muller *The impact of section 26 on the Eviction of Squatters in South African Law* LLD, Stellenbosch University (2011) 231-257 on "Joinder" which analyses the case law on necessary joinder of local authorities to eviction proceedings. See the following cases in this regard: *ABSA Bank Ltd v Murray* 2004 2 SA 15 (CC); *Cashbuild (South Africa) (Pty) Ltd v Scott* 2007 1 SA 332 (T); *Lingwood v The Unlawful Occupiers of R/E of Erf 9 Highlands* 2008 3 BCLR 325 (W); *Sailing Queen Investments v The Occupants of La Colleen Court* 2008 6 BCLR 666 (W); *Chieftain Real Estate Incorporated in Ireland v Tshwane Metropolitan Municipality* 2008 5 SA 387 (T); *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue* 2009 1 SA 470 (W); *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties (Pty) Ltd* 2011 4 SA 337 (SCA) para 40; *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 30 (Pty) Ltd* 2012 2 SA 104 (CC) paras 42-46; *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 6 SA 294 (SCA) para 37.
[962] Liebenberg & Muller (2013) *SAJHR* 554 555-557; 569-570; *Sailing Queen Investments v The Occupants of La Colleen Court* 2008 6 BCLR 666 (W).
[963] 2008 6 BCLR 666 (W).

provide the evicted occupiers with adequate land and housing.[964] Joining the State (or more specifically the local government) to the eviction process can be regarded a matter of necessity, because it may ensure that the State fulfils its constitutional obligation.[965] Ultimately, joinder of the relevant State officials to the implementation of court orders will ensure that State officials are aware of what is expected of them in terms of the Constitution and their statutory obligations. The parties responsible for the execution of a court order will not be able to aver that they did not have knowledge of the order. Accordingly, joinder of the correct and relevant parties, officials and departments during the procedural phase of the eviction process ensures that those responsible for the execution of a subsequent court order are aware of their duties and responsibilities.[966]

In terms of the Constitution,[967] the Housing Act 107 of 1997[968] and the Local Government: Municipal Systems Act 32 of 2000,[969] read with the Constitution, the local authority has a direct interest being joined to eviction proceedings and the execution of such orders.[970] Although contempt of court could not be proved, the joinder of the relevant individual State officials (the Mayor, MEC and particularly the Municipal Manager) responsible for executing the court order obtained in *Pheko 1*, constituted an appropriate and necessary remedy in the circumstances of the case.[971] Hopefully, the effect of joining these State officials to the proceedings will provide effective relief for the unlawful occupiers in the near future.

4 Reflection

Contempt of court should be condemned in all cases, but more so in cases where the order which the State is unable to comply with concerns the realisation of basic human rights, such as the right to access to housing,[972] and the right not to be arbitrarily

[964] *Sailing Queen Investments v The Occupants of La Colleen Court* 2008 6 BCLR 666 (W) paras 3, 6 and 8; *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* 2015 6 BCLR 711 (CC).
[965] Muller & Liebenberg (2013) *SAJHR* 555 and 569-570.
[966] *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* 2015 6 BCLR 711 (CC) para 59; *City of Johannesburg Metropolitan Municipality v Hlophe* 2 All SA 251 (SCA) paras 18-20 and 22-24.
[967] Sections 152, 153 and 156 of the Constitution of the Republic of South Africa, 1996.
[968] Sections 7 and 9 of the Housing Act 107 of 1997.
[969] Section 73 of the Local Government: Municipal Systems Act 32 of 2000.
[970] Liebenberg & Muller (2013) *SAJHR* 559-560; 569-570.
[971] Liebenberg & Muller (2013) *SAJHR* 558.
[972] *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* 2015 6 BCLR 711 (CC) para 61.

deprived of property.[973] The problem is exacerbated when unwillingness and avoidance by the State to adhere to their constitutional and statutory obligations also enter into the picture.

In theory, contempt of court can be viewed a judicial tool to enforce previously obtained court orders. One method of obtaining compliance is by way of an order for committal. In this regard, the correct parties responsible for the execution of court orders should be joined to the proceedings[974] and the necessary requirements as laid out in *Fakie* must be proved beyond reasonable doubt.[975] Where the strict requirements to establish contempt of court cannot be proved, other remedies should be explored. Apart from committal, other remedies, such as declaratory relief, a *mandamus*, a fine and any further orders that would have the effect of coercing compliance may still be employed.[976]

It is however questionable whether a further declaratory order or *mandamus* requiring the relevant State officials to adhere to a court order will provide effective relief. How can one expect and accept that the State will adhere to a further *mandamus* where there has already been a failure to adhere to a previously obtained *mandamus* in the form of a structural interdict?

Where the State officials responsible for executing court orders are not joined to the execution of a structural interdict order, further joinder coupled with a declaratory order or *mandamus*, such as in the case of *Pheko 2*, could constitute appropriate relief.[977] However, just because contempt of court cannot be established does not mean that the State has realised the constitutional rights of the parties involved in the eviction process. A continuous failure to realise the rights of the land owner and/or the unlawful

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[973] Section 25(1) of the Constitution of the Republic of South Africa, 1996. See in general *First National Bank of South Africa Ltd t/a Wesbank v Commissioner South African Revenue Service; First National Bank of South Africa Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) which established the test for determining whether a deprivation amounts to a procedurally and/or substantively arbitrary deprivation. See in general AJ van der Walt *Constitutional Property Law* (2011) 190-333 where he comprehensively discusses the definition of an arbitrary deprivation of property. See also T Roux "Property" in S Woolman and M Bishop (eds) *Constitutional Law of South Africa* 2 ed (OS 12 2003) 46-17-46-28. J Strydom & S Viljoen (Maass) "Unlawful occupation of inner-city buildings: A constitutional analysis of the rights and obligations involved" (2014) 17 *PELJ* 1207, 1220, 1222-1223, 1231-1235.
[974] *Meadow Glen Home Owners Association v City of Tshwane Metropolitan Municipality and Another* 2015 1 All SA 299 (SCA) para 16.
[975] *Fakie NO v CCII Systems (Pty) Ltd* 2006 4 SA 326 (SCA) para 42.
[976] *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* 2015 6 BCLR 711 (CC) para 37; *Fakie NO v CCII Systems (Pty) Ltd* 2006 4 SA 326 (SCA) para 65.
[977] *City of Johannesburg Metropolitan Municipality v Hlophe* 2015 2 All SA 251 (SCA) paras 25-26.

occupiers amounts to a continuous infringement of rights. The parties will still be entitled to effective relief,[978] even where contempt of court cannot be established. Accordingly, where the correct State officials are already joined as the responsible parties for the execution of a structural interdict, and contempt of court cannot be established, further relief in the form of a fine or constitutional damages seems to be more appropriate.

5 Failure to enforce orders *ad pecuniam solvendam*

5 1 Introduction

Effective relief will not be realised where a court awards constitutional damages to compensate a land owner for the arbitrary deprivation of his or her property,[979] but there is a failure by the State to pay the amount. Accordingly, the enforcement of the money order will ensure that effective relief is provided to the land owner. Fortunately, there has been no case to date, where the State has failed to pay a party involved in an eviction case entitled to an order for constitutional damages.

When the order is for the payment of money, such as an order to pay constitutional damages, it cannot be enforced by a committal for contempt even if the person ordered to pay has the means to do so but refuses to pay.[980] Instead, the judgment creditor will be entitled to execute against the judgment debtor's property in order to enforce the order *ad pecuniam solvendam*. In general, execution is a process in terms of which

[978] *City of Johannesburg Metropolitan Municipality v Hlophe* 2015 2 All SA 251 (SCA) para 26.
[979] Section 25(1) of the Constitution of the Republic of South Africa, 1996. See in general *First National Bank of South Africa Ltd t/a Wesbank v Commissioner South African Revenue Service; First National Bank of South Africa Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC). See also Van der Walt *Constitutional Property Law* 190-333 where he comprehensively discusses the definition of an arbitrary deprivation of property. See also Roux "Property" in *CLOSA* 46-17-46-28; Strydom & Viljoen (Maass) (2014) *PELJ* 1207 1220, 1222-1223, 1231-1235.
[980] Cilliers *et al The civil practice of the High Courts 2* 1106; A Ganesh "Contempt and execution in vindicating the right to education" (2014) 29 *SAPL* 19 25. The court in *Nyathi v Member of the Executive Council for the Department of Health, Gauteng* 2008 5 SA 94 (CC) para 76 held that the "committal of public officials would only result in the 'naming and shaming' of such officials and would produce no real remedy for the aggrieved party litigant who is primarily concerned with the payment of the judgment debt. The potential disruption of already overburdened state departments is also a result which should be avoided."

a judgment debtor's property is attached by the Sheriff and sold by public auction in order to raise funds to satisfy the judgment.[981]

However, this route was precluded in respect of money judgments obtained against the State by the provisions of section 3 of the State Liability Act 20 of 1957 ("State Liability Act"),[982] prior to the Constitutional Court's judgment in *Nyathi v Member of the Executive Council for the Department of Health Gauteng* ("Nyathi 1").[983]

5 2 The execution of orders *ad pecuniam solvendam* prior to *Nyathi 1*

Prior to *Nyathi 1,* litigants, in an attempt to get the State to comply with money judgments, ventured to obtain declarations of contempt of court against the State and relevant public functionaries responsible for overseeing compliance with court orders.[984] The court in *Mjeni v Minister of Health and Welfare, Eastern Cape*[985] accordingly held that the common law distinction between orders *ad pecuniam solvendam* and orders *ad factum praestandum* should not apply in cases where the State was the judgment debtor. The court further held that the combined effect of the common law and the State Liability Act, if not developed, was that "those who sue the State run the risk of obtaining hollow and unenforceable judgments".[986] The Supreme Court of Appeal in *Jayiya v MEC for Welfare Eastern Cape* ("Jayiya")[987] however, disagreed with this development. The court held that the common law could not evolve in conflict with legislation or basic principles of law.[988] In addition, the court held that development had created a situation which endorses the retrospective creation of a new crime of contempt or the extension of the limits of the existing crime, which is

[981] Sections 61-79 of the Magistrate's Court Act 32 of 1944 and sections 36, 39 and 40 of the Supreme Court Act 59 of 1959; LN Wessels *Tenuitvoerlegging van hofbevele teen die Staat* LLM, Stellenbosch University (2006); Roos (2005) *SAPL* 167-175.
[982] Section 3 of the State Liability Act 20 of 1957 read as follow: "No execution, attachment or like process shall be issued against the defendant or respondent in any such action or proceedings or against any property of the State, but the amount, if any, which may be required to satisfy any judgment or order given or made against the nominal defendant or respondent in any such action or proceedings *may* be paid out of the National Revenue Fund or a Provincial Revenue Fund, as the case may be" (my emphasis); Wessels *Tenuitvoerlegging van hofbevele* 2-4.
[983] 2008 5 SA 94 (CC); Olivier and Williams (2011) *Obiter* 489, 493.
[984] Liebenberg *Socio-Economic Rights* 452; *Mjeni v Minister of Health and Welfare, Eastern Cape* 2000 4 SA 446 (Tk); *East London Transitional Local Council v MEC for Health, Eastern Cape* 2000 4 All SA 443 (Ck).
[985] 2000 4 SA 446 (Tk). See also Wessels *Tenuitvoerlegging van hofbevele* 25-41.
[986] *Mjeni v Minister of Health and Welfare, Eastern Cape* 2000 4 SA 446 (Tk) 453I-454B.
[987] 2004 2 SA 611 (SCA).
[988] *Jayiya v MEC for Welfare, Eastern Cape* 2004 2 SA 611 (SCA) para 18; Wessels *Tenuitvoerlegging van hofbevele* 42-45.

prohibited not only by general principles of the common law, but also in terms of section 35(3)(l) of the Constitution.[989]

Subsequently, Froneman J in *Kate v MEC for the Department of Welfare, Eastern Cape*[990] severely criticised the judgment in *Jayiya* holding that:

> "It is one thing to realise the possibility *as a matter of fact* that the government might refuse to comply with court orders. It is something completely different to hold *as a matter of law* that courts are powerless to devise ways to ensure compliance with court orders in a constitutional State such as ours. In the former case the Government would, in refusing to comply with court orders, place itself outside the ambit of constitutional government and a constitutional crisis would be created. For the courts to do the latter would be to aid and abet the unconstitutional government. If the interpretation of section 3 of the State Liability Act in *Jayiya* means that the Government is not bound to comply with court orders sounding in money, or that the courts cannot devise other legal means to ensure compliance with court orders, then there is no possible way that I can think of how section 3 of the State Liability Act, if interpreted in this manner, can serve the rule of law and the Constitution".[991]

If litigants were left without any way of enforcing money judgments, then they would be left without an effective remedy to vindicate their rights. In the context of evictions it means that effective relief will not be realised, where the land owner is left without a means of enforcing an order for constitutional damages.

On appeal in *Kate v MEC for the Department of Welfare, Eastern Cape* ("Kate SCA")[992] the court held that it is still possible to impose a *mandamus* on public functionaries where there has been a failure to enforce the court's orders. Where the State official then fails to do so or refrains from doing something in terms of the *mandamus* granted, he or she will be liable to be committed for contempt in accordance with the ordinary principles, set out above.[993] The court however conceded that a *mandamus* will have little practical value and would only lead to more litigation.[994] Therefore, the decision

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[989] *Jayiya v MEC for Welfare, Eastern Cape* 2004 2 SA 611 (SCA) para 18; Liebenberg *Socio-Economic Rights* 452.
[990] 2005 1 SA 141 (SE); Wessels *Tenuitvoerlegging van hofbevele* 48-51.
[991] *Kate v MEC for the Department of Welfare, Eastern Cape* 2005 1 SA 141 (SE) para 25.
[992] 2006 4 SA 478 (SCA).
[993] See 1 and 5 1 above.
[994] *Kate v MEC for the Department of Welfare, Eastern Cape* 2006 4 SA 478 (SCA) para 19; Liebenberg *Socio-Economic Rights* 453; Cillers *et al The civil practice of the High Courts 2* 1104-1110.

in *Kate* still did not provide a solution to the problem relating to functionaries who are not prepared to fulfil their constitutional obligations.

5 3 The execution of orders *ad pecuniam solvendam* after *Nyathi 1*

The Constitutional Court's judgment in *Nyathi 1* represented a "major breakthrough in enforcing money judgments against the State",[995] where the court declared section 3 of the State Liability Act unconstitutional "to the extent that it does not allow for execution or attachment against the State and that it does not provide for an express procedure for the satisfaction of judgment debts".[996] The court reasoned that the prohibition on execution against property of the State in the Act unjustifiably limited the right to have equal protection of the law,[997] the right to dignity[998] and the right of access to courts.[999] Furthermore, the court held that the procedure set out in the State Liability Act, read with the Public Finance Management Act 1 of 1999 was "inaccessible to the majority of creditors and…far too complex to constitute a reasonable fulfilment of the State's obligations in terms of the Constitution",[1000] which amounted to an ineffective remedy for the enforcement of judgment debts against the State. Legislative intervention was needed in order to provide for a more efficient and effective procedure for the settlement of money judgments against the State.[1001]

The order was accordingly suspended for 12 months so as to allow parliament to pass legislation that provides for an effective procedure. Further extensions in respect of

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[995] Liebenberg *Socio-Economic Rights* 453.

[996] *Nyathi v Member of the Executive Council for the Department of Health Gauteng* 2008 5 SA 94 (CC) para 92; Olivier and Williams (2011) *Obiter* 495-501. See also R Malherbe & M van Eck "State non-compliance with legal duties: The Constitutional Court finally cracks the whip" (2009) *TSAR* 191-198; Roos (2005) *SA Public Law* 167-175; R Roos "Executive disregard of court orders: Enforcing judgments against the state" (2006) *SALJ* 744; Wessels *Tenuitvoerlegging van hofbevele* 61-84.

[997] Section 9(1) of the Constitution of the Republic of South Africa, 1996; Wessels *Tenuitvoerlegging van hofvbevele* 83-86.

[998] Section 10 of the Constitution of the Republic of South Africa, 1996.

[999] Section 34 of the Constitution of the Republic of South Africa, 1996; *Nyathi v Member of the Executive Council for the Department of Health, Gauteng* 2008 5 SA 94 (CC) paras 36-47; Wessels *Tenuitvoerlegging van hofbevele* 71-83 submits that section 3 of the State Liability Act 20 of 1957 unjustifiably limits sections 9 and 34 of the Constitution, in addition to being contrary to sections 165, 173 and 195(f) of the Constitution of the Republic of South Africa, 1996.

[1000] *Nyathi v Member of the Executive Council for the Department of Health, Gauteng* 2008 5 SA 94 (CC) para 58.

[1001] *Nyathi v Member of the Executive Council for the Department of Health, Gauteng* 2008 5 SA 94 (CC) para 74, 83; Liebenberg *Socio-Economic Rights* 454; Olivier & Williams (2011) *Obiter* 506.

the suspended declaration of invalidity were granted by the court until 31 August 2011 and an interim procedure to operate during the period of suspension was devised.[1002]

The State Liability Amendment Act 14 of 2011 ("the Act") now comprehensively deals with and regulates the manner in which a final court order sounding in money against the State must be satisfied.[1003] In essence, the Act sets out the required procedure to execute money judgments.[1004] If the procedure is followed it allows a judgment creditor to attach moveable property of the State, to satisfy a judgment sounding in money.[1005]

The following procedure for issuing a writ of execution against the relevant State department must be followed in terms of the amended Act. Upon obtaining a final court order sounding in money against the State, the State attorney or attorney of record must notify the relevant department in writing within seven days.[1006] According to the Act, the amount ordered by the court should be paid within 30 days.[1007] If the court order is not satisfied the creditor may serve the order on the executive and accounting officer of the department and the State attorney or attorney of record appearing on behalf of the department concerned and the relevant treasury.[1008] The relevant treasury official then has 14 days within which he or she must either satisfy the court order or make acceptable arrangements with the judgment creditor.[1009] It follows that if the court order is not satisfied by the particular treasurer and/or acceptable arrangements are not made, the registrar or clerk may issue a warrant in relation to relevant moveable property owned by the State. At this point, the Sheriff can attach the moveable property belonging to the State, but he or she may not remove it.[1010]

[1002] *Minister of Justice and Constitutional Development v Nyathi* 2010 4 SA 567 (CC); Olivier & Williams (2011) *Obiter* 506-513.

[1003] Section 3 of the State Liability Amendment Act 14 of 2011 (satisfaction of final court orders sounding in money) reads that "no execution, attachment or like process for the satisfaction of a final court order sounding in money may be issued against the defendant or respondent in any action or legal proceeding against the State, but the amount, if any, which may be required to satisfy any final order given or made against the nominal defendant or respondent in any such action or proceedings *must* be paid out…"(my emphasis).

[1004] For a detailed account of the procedure set out in the State Liability Amendment Act 14 of 2011 see ME Ramonyai "State Liability Amendment Act: Process of attachment (practice note)" (2013) *De Rebus* 20; L Boonzaaier "State Liability in South Africa: A more direct approach" (2013) 130 *SALJ* 330-368.

[1005] Section 3(7) of the State Liability Amendment Act 14 of 2011; Ramonyai (2013) *SALJ* 20.

[1006] Section 3(2) of the State Liability Amendment Act 14 of 2011; Ramonyai (2013) *SALJ* 20.

[1007] Section 3(a)(i) of the State Liability Amendment Act 14 of 2011; Ramonyai (2013) *SALJ* 20.

[1008] Section 3 (b)(ii) of the State Liability Amendment Act 14 of 2011; Ramonyai (2013) *SALJ* 20.

[1009] Section 3(5) of the State Liability Amendment Act 14 of 2011; Ramonyai (2013) *SALJ* 20.

[1010] Section 3(6) and 3(7)(a) and (b) of the State Liability Amendment Act 14 of 2011; Ramonyai (2013) *SALJ* 20.

Additionally, the Sheriff and the relevant State official may, by way of agreement determine which State-owned property may not be attached, removed or sold, especially where it will disrupt service delivery, threaten life or put public safety at risk.[1011] If however, no agreement is reached, the Sheriff may attach any movable property owned by the State and used by the department concerned.[1012] The Sheriff of the court may after the expiration of 30 days from the date of attachment, remove and sell the attached movable property in execution of the judgment debt.[1013]

As of yet, there has been no cases in the context of evictions where a party has obtained an order sounding in money where the State has failed to pay such a party. However, where a court awards constitutional damages[1014] to a land owner and the State fails to abide by the money judgment, a land owner will have to rely on the procedure set out in the Act for effective relief.

6 Conclusion

Where there is a failure to execute an eviction order, the court has a wide selection of remedies at its disposal so as to ensure that there is compliance. The court may decide to either grant a structural interdict[1015] or constitutional damages[1016] in the hope that it will provide relief to the affected parties.

Where a structural interdict is issued and there is a further failure to adhere to or execute it, the court may either issue a follow-up and/or more specific structural interdict;[1017] opt for alternative relief such as constitutional damages[1018] or raise the issue of contempt of court *mero motu*.[1019]

[1011] Section 7(a) and (b) of the State Liability Amendment Act 14 of 2011; Ramonyai (2013) *SALJ* 20.
[1012] Section 3(7)(c) of the State Liability Amendment Act 14 of 2011; Ramonyai (2013) *SALJ* 20.
[1013] Section 3(7)(c) of the State Liability Amendment Act 14 of 2011; Ramonyai (2013) *SALJ* 20.
[1014] See Chapter 3 for a discussion of constitutional damages.
[1015] See Chapter 2 above in general.
[1016] See Chapter 3 above in general.
[1017] *Residents of Joe Slovo Community, Western Cape v Thubelisa Homes* 2010 3 SA 454 (CC) and *Residents of Joe Slovo Community, Western Cape v Thubelisa Homes* 2011 7 BCLR (CC). See Chapter 2 at 4 3 above.
[1018] *Modder East Squatters v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa v Modderklip Boerdery* 2004 3 All SA 169 (SCA) and *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC). See Chapter 2 at 4 2 above.
[1019] *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* 2015 6 BCLR 711 (CC). See Chapter 2 at 4 4 above.

Where further structural interdicts or constitutional damages are not utilised, the litigant may seek the enforcement of the order *ad factum praestandum* (whether it be a land owner or *amicus* of the court acting on behalf of the unlawful occupiers) or the court may raise the issue of contempt of court. In this regard, the requirements for contempt of court as laid down in *Fakie*, must be proved beyond reasonable doubt. As is evident from *Meadow Glen*, joinder will play an important role in holding the correct individual State officials accountable for the execution of court orders.[1020] Ultimately, joinder of the relevant State officials to the execution of court orders will ensure that State officials are aware of what is expected of them in terms of the Constitution and their statutory obligations. If they fulfil their constitutional and statutory obligations, effective relief will ultimately be realised. In this regard, contempt of court proceedings provides a way of executing orders *ad factum praestandum.* However, where there is no wilful disobedience and no *mala fides* on the part of the State, it will not be possible to find the defaulting party in contempt of court. In such cases, other relief, such as declaratory orders, further structural interdicts, a fine or constitutional damages will have to be utilised to ensure compliance and obtain eventual effective relief. Failure to comply with a further structural interdict may lead to further contempt of court proceedings or further litigation. Where this is the case, it means that there has already been a continuous failure to comply with orders of the court and providing effective relief, without addressing or solving the real problem - the provision and realisation of adequate housing for those in desperate need thereof. It is questionable whether the relief, if any, at this stage in the litigation process can be regarded as effective, having regard to the cost and time associated with obtaining relief.

Where the State fails to adhere to an order *ad pecuniam solvendam*, at any stage of litigation, such as an order requiring the State to pay a fine or constitutional damages, the judgment creditor will have to follow the procedure set out in the State Liability Amendment Act to enforce the money order and ultimately obtain effective relief.

[1020] *Meadow Glen Home Owners Association v City of Tshwane Metropolitan Municipality and Another* 2015 1 All SA 299 (SCA) para 22; *City of Johannesburg Metropolitan Municipality v Hlophe* 2015 2 All SA 251 (SCA) paras 18-20 and 25; Liebenberg & Muller (2013) *SAJHR* 569-570.

Chapter 5: Reflections, Recommendations and Conclusions

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1 Summary

In essence, effective relief regarding residential property following the failure to execute an eviction order, constitutes relief that will realise the rights of the respective parties involved in the particular case within a reasonable time. This thesis set out to establish whether the structural interdict, constitutional damages and contempt of court proceedings may be regarded as effective relief where there has been a failure to execute an eviction order.

Chapter 2 began with an exposition of the general requirements for a structural interdict, followed by the nature, scope, purpose and features of the structural interdict. Having regard to the anatomy of the structural interdict, arguments against and in favour of the use of the structural interdict were explored. In this regard the structural interdict has been criticised for infringing the separation of powers doctrine. However, this main criticism can be addressed through formulating the structural interdict in such a way that it does not conflict with the separation of powers doctrine. Another way to address the criticisms is by way of using different models for supervision. In this regard, the models found in American jurisprudence have provided some insight. The bargaining, public hearing, expert remedial formulation, report back to court and consensual remedial formulation models provide different processes and methods for oversight, which are key to the structural interdict's anatomy. It is clear that the formulation of the structural interdict and model used for oversight must be of such a nature so as to suit the very specific circumstances of each case. Changing circumstances, often encountered in eviction cases, may also justify and require an altered formulation and consequently changed model for oversight for finally obtaining effective relief. In this regard, there is room for the South African courts to explore other models for oversight, apart from the report back to court model, which broadens the scope of outcomes in eviction cases.

Having established that there may be different approaches to finding effective relief, the circumstances under which it would be appropriate to use the structural interdict are explored. In this regard, various factors emerge that may be used by a court to determine whether a structural interdict will be an appropriate form of relief in a particular eviction case. Factors such as a past failure to comply with a court order, the consequences of non-compliance with a court order, the lack of specificity with

regard to the formulation of a structural interdict and cases where it is desirable to inform the parties involved in the eviction case of the steps that will be taken by the State may be used to determine whether a structural interdict will constitute appropriate relief in a given case. Appropriate relief does not necessarily mean that the relief granted is effective. Accordingly, a discussion of the factors is followed by an examination of the use of the structural interdict in South African eviction case law specifically. The discussion of the case law considers whether the use of the structural interdict was appropriate in the specific case, in accordance with the factors identified by the courts and academic writers and whether it provided effective relief.

Although the use of the structural interdict made sense at a theoretical level, it did not provide effective relief in all cases, for various reasons. In some cases it was not the appropriate remedy from the outset. In other cases is was not effective because of a further failure by the State to adhere to the structural interdict, for a variety of reasons. In such cases, further or alternative relief was required to realise the rights of the land owner and unlawful occupiers respectively.

Chapter 3 set out to explore whether indirect or direct constitutional damages can provide relief in the eviction context where the structural interdict was not appropriate or was not executed. In line with the single-system of law concept and subsidiarity principles, reliance should first be placed on indirect constitutional damages. Only where there is no legislation that provides for monetary compensation or where the common law does not provide effective relief within the eviction context, may reliance be placed on direct constitutional damages. In the context of evictions, PIE does not provide for a compensation remedy, nor does the law of delict provide for an effective remedy. In the absence of a regulatory framework providing for compensation in cases where the unlawful occupation of land amounts to an indefinite deprivation of the land owner's property, reliance on direct constitutional damages is warranted. In this regard, the Canadian approach to direct constitutional damages, developed in the *Ward* judgment, is discussed. The framework may provide insight and guidance to the South Africa courts with regard to whether direct constitutional damages may be appropriate in a specific case. This discussion is followed by an analysis of the use of direct constitutional damages in South African eviction case law. Using the four step framework laid down in *Ward,* coupled with the listed factors in *Kate*, the discussion and analysis of *Modderklip CC* considers whether the use of direct constitutional

damages was appropriate. While direct constitutional damages may have constituted *appropriate* relief in *Modderklip* CC, it did not provide *effective* relief. Accordingly, alternative forms of relief such as expropriation, *Ausgleich* and sharing are also considered briefly.

Finally, by way of comparison, *Blue Moonlight SCA* illustrates when constitutional damages will *not* be regarded as appropriate relief.

In Chapter 4, dealing with civil contempt of court proceedings, it was found that although contempt of court proceedings is not a remedy in itself, it can be regarded as a means to achieving effective relief. In principle, contempt of court orders force a defaulting party to execute a previously obtained court order (orders *ad factum praestandum* or *ad pecuniam solvendam*), which can ultimately result in effective relief for the respective parties involved in an eviction case. In this regard, it is important that the correct defaulting party be joined to the proceedings so as to promote greater efficacy. It is clear that the State has a role to play in the realisation of the land owner's and unlawful occupiers' rights. The State must protect the land owner's property rights and provide the marginalised unlawful occupiers with the means of realising their right to have access to adequate land and housing.

2 Reflection

2 1 Introduction

While the court has a wide selection of remedies at its disposal,[1021] it has an integral role to play in the optimal balancing exercise in relation to the litigating parties, who often have conflicting rights and interests, especially in the context of evictions. The court also has an important role to play in officiating where other branches of government, namely the executive and the legislative branches, are relevant. While adjudicating it is also critical that the courts adhere to the separation of powers doctrine. In this regard, the extent of the judiciary's control over the State (the

[1021] Section 38 read with section 172(1)(b) of the Constitution of the Republic of South Africa, 1996; *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) paras 18 and 33. See also *Fose v Minister of Safety and Security* 1997 7 BCLR (CC) para 69; M Bishop "Remedies" in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (RS 6 2014); C Mbazira *Strategies for effective implementation of court orders in South Africa*: *You are the "weakest link" in realising socio-economic right: Goodbye* (2008) 5; S Liebenberg *Socio-Economic Rights: Adjudication under a transformative constitution* (2010) 377-461.

executive and the legislature) is indeterminate.[1022] Generally, the courts have the jurisdiction to oversee and supervise State actions.[1023]

In this regard, Froneman J held that:

> "[J]udges will invariably "create law" [when giving content to the values and principles in the Constitution]. For those steeped in the tradition of parliamentary sovereignty, the notion of judges creating law, and not merely interpreting and applying law, is an uncomfortable one. Whether that traditional view was ever correct is debatable, but the danger exists that it will inhibit judges from doing what they are called upon to do in terms of the Constitution."[1024]

Accordingly, the court has the authority to ensure that empowered State officials carry out their constitutional duties so as to protect constitutional rights and provide effective relief. The court's power to provide effective relief is dependent on a number of factors, including, but not limited to, the willingness of the judge to interfere with the execution of State action (which is often, but not always, politically driven),[1025] the willingness of the State to cooperate with other spheres of governments, the attitude of the State officials in adhering to court orders and budgetary and other resource allocations.[1026] Ultimately, the State's conduct is framed and set out in the Constitution and the adjudication thereof is guided by the law in its all-encompassing sense.

Yet, given the court's powers, it still remains unclear to what extent a court may intervene in State action.[1027] Judicial deference or respect[1028] may be required in cases where there are multiple social and/or economic consequences for the community; issues that are of a polycentric nature[1029] or where the decision taken by

[1022] S Viljoen "The systemic violation of section 26(1): An appeal for structural relief by the judiciary" (2015) 30 *SAPL* 54.
[1023] *Kaunda v President of the Republic of South Africa* 2005 4 SA 235 (CC) para 244.
[1024] *Kaunda v President of the Republic of South Africa* 2005 4 SA 235 (CC) paras 597-598.
[1025] Viljoen (2015) *SAPL* 55.
[1026] Viljoen (2015) *SAPL* 55; Mbazira *Strategies for effective implementation* vi.
[1027] Viljoen (2015) *SAPL* 55.
[1028] C Hoexter *Administrative law in South Africa* 2 ed (2012) 138-139; C Hoexter "The future of judicial review in South African administrative law" (2000) *SALJ* 507.
[1029] M Pieters "Coming to terms with judicial enforcement of socio-economic rights" (2004) 20 *SAJHR* 295.

the executive branch of State is highly technical.[1030] Regardless of the uncertainty, the court still has a duty to evaluate State action that concerns the infringement of constitutional rights.[1031] Accordingly, while the court may not make budgetary allocations and determine how the State should structure its housing policies, it may still determine and adjudicate on whether the State has used its resources effectively for the realisation of constitutional rights.

The court's duty and role are crucial to the transformation of society, as it has to enjoin the executive and the legislature to respect, protect, promote and fulfil the rights in the Bill of Rights.[1032] This requires active involvement from the court, usually by requiring the State to take appropriate measures to give effect to constitutional rights.[1033] The question remains *how* the court will hold the State accountable in cases where it failed to vindicate the rights of affected parties in eviction cases, without seizing the functions of the executive or the legislature. The realisation of the rights to have access to land and housing respectively, without infringing the right not to be arbitrarily deprived of property,[1034] is especially difficult to adjudicate on "since it is a polycentric issue with multiple social and economic repercussions for the community".[1035] Apart from the inherent difficulties mentioned here, it is also practically challenging to dictate *how* the State should realise these rights as a number of different State actions taken at different governmental levels are necessary.[1036] Nevertheless, the court must ensure that the State fulfils its constitutional obligations. This requires, at the very least, that the State provide the homeless with a secure space that will, to some extent, provide tenure security.[1037] In this regard, the court serving in its supervisory role is required to have oversight in relation to the actual realisation of the land owner's and unlawful

[1030] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC) para 48.
[1031] Viljoen (2015) *SAPL* 56.
[1032] Section 7(2); read with sections 25(1), 25(6) and 26 of the Constitution of the Republic of South Africa, 1996.
[1033] Viljoen (2015) *SAPL* 56. See for example *Pitje v Shibambo* 2016 4 BCLR 460 (CC); *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 6 SA 294 (SCA); *Mahogany Ridge 2 Property Owners Association v Unlawful Occupiers of Lot 13113 Pinetown* 2013 2 All SA 236 (KZD); *Johannesburg Housing Corporation (Pty) Ltd v The Unlawful Occupiers of the Newtown Urban Village* 2013 1 SA 583 (GSJ).
[1034] Section 25(1) of the Constitution of the Republic of South Africa, 1996.
[1035] Viljoen (2015) *SAPL* 57.
[1036] Viljoen (2015) *SAPL* 57.
[1037] Viljoen (2015) *SAPL* 58; *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2004 6 SA 40 (SCA) para 22.

occupiers' respective constitutional rights over a period of time. Ideally, the oversight should ensure that the State's medium and long term plans pertaining to the provision of land and adequate housing are realised.[1038] Arguably, the structural interdict could serve as a remedy and a means of ensuring that the State realises these rights.

Having regard to the remedies discussed in this thesis, it should be noted that acquiring effective relief can be time-consuming and costly processes for private or State land owners seeking to evict unlawful occupiers from property used for residential purposes. Where an eviction order is granted, it must be executed with the assistance of the South African Police Force or other State officials or agents.[1039] A failure to execute an eviction order granted by the court, can subsequently lead to further litigation between the affected parties.[1040] Although not limited to the following remedies, the court may decide to either grant a structural interdict[1041] or constitutional damages in cases where there has been a failure to execute an eviction order.[1042] However, the question remains whether these remedies will provide *effective* relief.

2 2 Mechanisms to achieve effective relief

An analysis of the structural interdict in Chapter 2 has shown that although the remedy may provide effective relief in theory, the lack of participation by the State to execute the remedy as a means of realising the rights of the parties, remains problematic and worrisome.[1043] State participation is determined and impacted on by various factors, including capacity, resources, budgetary considerations, good governance and sustainability.[1044] The particular disposition of the relevant State official or officials within a particular State department may also emerge at this point, ultimately impacting negatively on active participation. Peculiarly, the very circumstance that triggers the

[1038] Viljoen (2015) *SAPL* 58.
[1039] Section 205(3) of the Constitution of the Republic of South Africa, 1996 read with section 14 of the South African Police Service Act 65 of1995.
[1040] See for example *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2011 7 BCLR (CC); *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) and *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* 2015 6 BCLR 711 (CC). These cases are discussed in Chapters 2, 3 and 4 respectively. See also E MacDonnell Chilemba "Evictions in South Africa during 2014 - an analytical narrative: feature" (2015) 16 *ESR Review* 3-6.
[1041] See Chapter 2 in general.
[1042] See Chapter 3 in general.
[1043] Viljoen (2015) *SAPL* 57.
[1044] Mbazira *Strategies for effective implementation* vi. See in general Van Wyk (2011) *PELJ* 50-83; JM Pienaar & H Mostert "Uitsettings onder die Suid-Afrikaanse grondwet: die verhouding tussen artikel 25(1), artikel 26(3) en die Uitsettingswet (slot)" (2006) 3 *TSAR* 522-536.

use of a structural interdict is also the determining factor linked to the successful implementation thereof. What is even more worrisome is that, while the State is constitutionally mandated to give effect to the rights in the Bill of Rights, it is often the transgressor.[1045] *Pheko 1*, for example, shows that the State was reluctant to give effect to the rights enshrined in section 26 of the Constitution, as it failed to provide the unlawful occupiers with alternative, post-eviction land and housing.[1046] Section 26, read with section 25(6) of the Constitution, envisions *legally secure tenure*.[1047] By allowing the occupiers to remain on the land unlawfully, such as in the case of *Modderklip CC* (or *Joe Slovo 1*), the rights of the unlawful occupiers remain uncertain. Strydom notes that "unlawful occupation of land is incongruent with legally secure tenure"[1048] and therefore cannot be sanctioned by the court.[1049]

Olivia Road, where the structural interdict was awarded prior to the eviction, illustrates that issuing a structural interdict *before* considering and awarding an eviction order in terms of PIE may provide effective relief. In other cases analysed in Chapter 2, the structural interdict was awarded *after* an eviction order was already granted. In those cases, effective relief was not realised. Accordingly, *Olivia Road* highlights that the structural interdict has the *potential* to provide effective relief if it is awarded sooner, rather than later, during the course of the eviction proceedings. Requiring the parties to engage meaningfully with one another *before* considering and awarding an eviction order should ideally be required to be a compulsory procedural step.[1050] Engagement in the early stages of the eviction processes will also ensure that the correct parties, such as *amici curiae* and State officials or departments, are identified and joined to the proceedings. Joinder of the correct and relevant parties, officials and departments at this stage ensures that those responsible for the execution of a subsequent court order are aware of their duties and responsibilities and can be held accountable.[1051] A

[1045] Viljoen (2015) *SAPL* 53.
[1046] Viljoen (2015) *SAPL* 53; Pienaar (2015) *SAPL* 7-8.
[1047] Pienaar (2015) *SAPL* 7-8.
[1048] Viljoen (2015) *SAPL* 69-70.
[1049] Viljoen (2015) *SAPL* 47; *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 59 where the court made a similar finding to the extent that the unlawful occupiers could remain on private land; Viljoen (2015) *SAPL* 69-70.
[1050] B Ray "*Occupiers of 51 Olivia Road v City of Johannesburg*: Enforcing the right to adequate housing through 'engagement'" (2008) 8 *HRLR* 703-713 highlights the necessity of meaningful engagement before an eviction order is granted.
[1051] *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* 2015 6 BCLR 711 (CC) para 59; *City of Johannesburg Metropolitan Municipality v Hlophe* 2 All SA 251 (SCA) paras 18-20 and 22-24.

situation such as in *Pheko 2* can accordingly be avoided by way of joinder, because the party responsible for the execution of a court order will not be able to raise the defence that they were not aware of the court order.

Despite its potential, in most cases, a structural interdict may not result in effective relief without close supervision by and scrutiny of the court, coupled with the willingness of the parties to engage meaningfully with one another and the State's fulfilment of its constitutional duties.[1052] Perhaps the degree of supervision and the model used should be adapted in direct correlation to changing circumstances in eviction cases to ensure that the State, over time, realises the rights envisioned by section 26 of the Constitution.

Where the use of a structural interdict has not provided effective relief, the right to a remedy does not simply wither away. Parties are still entitled to effective relief regardless of whether the structural interdict was successful or not. Accordingly, where a structural interdict is issued and there is a further failure to adhere to or execute it, the court may either issue a declaration; a follow-up and/or more specific structural interdict;[1053] opt for alternative relief such as constitutional damages[1054] or raise the issue of contempt of court *mero motu*.[1055] In such cases, the eviction process may become even more time-consuming and costly for the litigating parties with no guarantee of obtaining effective relief.

Importantly, constitutional damages can be viewed as a primary remedy or an alternative remedy for the vindication of parties' rights. Thus far, there has only been one case, *Modderklip CC*, where the court has awarded direct constitutional damages. The award for direct constitutional damages can be regarded as *alternative* relief, because the structural interdict was not executed in *Modderklip HC*. As of yet, the court has not used direct constitutional damages as a primary remedy in eviction cases. The adoption of a general framework for awarding direct constitutional

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[1052] *Occupiers of 51 Olivia Road Berea Township and 197 Main Street Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC) and Liebenberg *Socio-Economic Rights* 418-424.
[1053] See *Residents of Joe Slovo Community, Western Cape v Thubelisa Homes* 2010 3 SA 454 (CC). See Chapter 2 at 4 3 above.
[1054] See *Modder East Squatters v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa v Modderklip Boerdery and President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC). See Chapter 2 at 4 2 above.
[1055] See *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* 2015 6 BCLR 711 (CC). See Chapter 2 at 4 4 above.

damages should be considered, developed and established to ensure and promote the use of direct constitutional damages as a primary remedy. A discussion of constitutional damages has revealed that although compensation may adequately or partially vindicate the rights of a private land owner, the rights of the unlawful occupiers will be violated on a continuous basis where the State fails to provide legally secure tenure. In effect the rights of the unlawful occupiers remain *in limbo* where the State fails to adhere to its constitutional obligations. Despite realising the rights of the land owner and unlawful occupiers partially, in retrospect the best option in the *Modderklip* cases would arguably have been to expropriate the property.

Furthermore, constitutional damages are paid out of state funds comprised out of the taxpayer's money. Accordingly, it is the taxpayer who effectively pays the award for constitutional damages, while the State escapes liability.[1056] In this regard, state funds should be utilised more efficiently to address and cater for the provision of tenure security and adequate housing.[1057]

The recurring pattern seems to be that the State continuously fails to give effect to its constitutional obligations, regardless of the remedy awarded by the court. In other words, it seems that both the structural interdict and constitutional damages provide some relief, but the relief provided does not necessarily amount to *effective relief*, because the orders of the court are not adhered to in full by the State.

One way of ensuring that the orders of the court are fulfilled is to rely on civil contempt of court proceedings. As noted above,[1058] contempt of court proceedings is not a remedy in its own right, but rather a means of contributing to the realisation of effective relief. Where there is a failure to execute a structural interdict within a reasonable time, or where further structural interdicts are awarded but not executed, the litigant seeking the execution of the order *ad factum praestandum* (whether it be a land owner or *amicus* of the court acting on behalf of the unlawful occupiers) or the court *mero motu*, may raise the issue of contempt of court. In this regard, the requirements for contempt of court as laid down in *Fakie*, must be proved beyond reasonable doubt.

[1056] BL Batchelor *Constitutional Damages for the Infringement of a Social Assistance Right in South Africa: Are monetary damages in the form of interest a just and equitable remedy for the breach of a social right?* LLM University Fort Hare (2011) 128.
[1057] Sections 25(6) and 25(1) of the Constitution of the Republic of South Africa, 1996.
[1058] See 1 above.

In this context joinder is important for two main reasons. Firstly, it provides the court with an important and significant mechanism to involve relevant State departments and officials in the eviction process during the procedural and adjudication phases.[1059] In *Sailing Queen Investments v The Occupants of La Colleen Court*[1060] the court held that the interests of the unlawful occupiers, private land owner and the State would be protected if the State is joined to the proceedings, because the State has a duty to provide the evicted occupiers with adequate land and housing.[1061] If State officials are joined during the procedural and adjudication phases, then the State, in its different formats and various levels, will have the full picture of land needs and demands. Muller and Liebenberg add that joining the State (or the local government more specifically) to eviction proceedings is a matter of necessity in insisting that it fulfils its constitutional obligations.[1062] Secondly, as is evident from *Meadow Glen*, joinder will play an important role in holding the correct individual State officials accountable during the execution phase of the eviction process.[1063] Ultimately, joinder of the relevant State officials or departments to the execution of an eviction order, during the eviction process as a whole, will ensure that State officials are aware of what is expected of them in terms of the Constitution and their statutory obligations. The parties responsible for the execution of a court order will not be able to aver that they did not have knowledge of the order.

If the State sets out to fulfil its constitutional and statutory obligations, effective relief will ultimately be realised. However, where there is no wilful disobedience and no *mala*

[1059] See Muller *The impact of section 26 of the Constitution* 231-257 on "Joinder" which analyses the case law on necessary joinder of local authorities to eviction proceedings. See the following cases in this regard: *ABSA Bank Ltd v Murray* 2004 2 SA 15 (CC); *Cashbuild (South Africa) (Pty) Ltd v Scott* 2007 1 SA 332 (T); *Lingwood v The Unlawful Occupiers of R/E of Erf 9 Highlands* 2008 3 BCLR 325 (W); *Sailing Queen Investments v The Occupants of La Colleen Court* 2008 6 BCLR 666 (W); *Chieftain Real Estate Incorporated in Ireland v Tshwane Metropolitan Municipality* 2008 5 SA 387 (T); *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue* 2009 1 SA 470 (W); *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties (Pty) Ltd* 2011 4 SA 337 (SCA) para 40; *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 30 (Pty) Ltd* 2012 2 SA 104 (CC) paras 42-46; *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 6 SA 294 (SCA) para 37.

[1060] 2008 6 BCLR 666 (W).

[1061] *Sailing Queen Investments v The Occupants of La Colleen Court* 2008 6 BCLR 666 (W) paras 3, 6 and 8; *Pheko v Ekurhuleni Metropolitan Municipality* 2015 6 BCLR 711 (CC).

[1062] Muller & Liebenberg (2013) *SAJHR* 555 and 569-570.

[1063] *Meadow Glen Home Owners Association and Others v City of Tshwane Metropolitan Municipality and Another* 2015 1 All SA 299 (SCA) para 22; Liebenberg & Muller (2013) *SAJHR* 569-570.

fides on the part of the State, it will not be possible to find the defaulting party in contempt of court. In such cases, other relief, such as declaratory orders, further structural interdicts, a fine or constitutional damages will have to be utilised to ensure compliance with court orders.[1064] Failure to comply with a further structural interdict may lead to even further contempt of court proceedings or a need for further relief. Where this is the case, it means that there have already been continuous failures to comply with orders of the court, without addressing or solving the real problem - the provision and realisation of adequate land and housing for those in desperate need thereof. It is questionable whether the relief, if any, at this stage in the litigation process can be regarded as effective, having regard to the cost and time associated with obtaining relief.

Where the State fails to pay a sum of money (order *ad pecuniam solvendam*),[1065] at any stage of litigation, the judgment creditor will have to follow the procedure set out in the State Liability Amendment Act to enforce the order and ultimately obtain effective relief. Thus far, there have been no cases before the court where the parties have made use of the procedure set out in the State Liability Amendment Act within the eviction context. The lack of court cases dealing with the efficacy of the procedure in the State Liability Amendment Act either means that the procedure is effective or that the procedure has not been utilised that often because there are so few cases where direct constitutional damages are awarded.

2 3 Time considerations

One of the main concerns with obtaining effective relief is the time it takes to achieve it. If the time lapse between the start of the proceedings and the realisation of the parties' rights becomes too long, given the circumstances of the cases, it becomes questionable whether the relief provided can still be regarded as effective. For relief to be regarded as effective, the rights of the parties should be realised within a reasonable time. What constitutes a reasonable time in the context of evictions is case-specific, having regard to the particular circumstances of each case. Unfortunately, this means that what is deemed to be a *reasonable* time within the

[1064] *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* 2015 6 BCLR 711 (CC) para 37; *Fakie NO v CCII Systems (Pty) Ltd* 2006 4 SA 326 (SCA) para 65. See Chapter 4, 3 1 3 in this regard.
[1065] Such as an order requiring the State to pay a fine or constitutional damages.

context of effective relief may be rather vague and uncertain. That is necessary as the time period linked to the execution of an eviction order cannot be fixed and ought to be flexible in light of changing circumstances, the conduct and attitude of the parties, budget restraints, resource allocation problems and competency issues within the different levels of government.

The pertinent question in this regard is at what point during the course of litigation one may regard the period of time as *unreasonable.* The court in *Blue Moonlight SCA*[1066] held that a reasonable degree of patience should be expected of the land owner. The State must furthermore be given a reasonable time to comply with the accompanying order to provide alternative accommodation.[1067] While being expected to wait until the "slow wheels of justice and equally slow, if not slower, wheels of [S]tate action [to] take their course,"[1068] the land owner may potentially suffer massive financial loss.[1069] It is conceivable that the delay in the execution of an eviction order and/or the failure to execute a structural interdict may result in an arbitrary deprivation of property.[1070] While this thesis is not focused on determining whether PIE results in arbitrary deprivation or whether PIE is constitutionally sound, it is undeniable that where a land owner has obtained an eviction order in terms of PIE, but there is a failure to execute it within an extended period of time, the owner is deprived of most, if not all, of his or her rights of use, benefit and exploitation of his or her property.[1071]

Time considerations associated with the execution of an eviction order may also have an impact on whether there is an arbitrary deprivation of property. PIE does not intend to *permanently* deprive a land owner of ownership or enjoyment of property.[1072] In *Port*

[1066] 2011 4 SA 337 (SCA).
[1067] *City of Johannesburg Metropolitan Municipality v Blue Moonlight 39 (Pty)* Ltd 2011 4 SA (SCA) 337 para 100; M Kruger "Arbitrary deprivation of property: an argument for the payment of compensation by the state in certain cases of unlawful occupation" (2014) 131 *SALJ* 328 329.
[1068] Kruger (2014) *SALJ* 329.
[1069] Kruger (2014) *SALJ* 334.
[1070] Section 25(1) of the Constitution of the Republic of South Africa, 1996; *First National Bank of South Africa Ltd t/a Wesbank v Commissioner South African Revenue Service; First National Bank of South Africa Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC); Van der Walt *Constitutional Property Law* 190-333; Roux "Property" in *CLOSA* 46-17-28; J Strydom & S Viljoen (Maass) "Unlawful occupation of inner-city buildings: A constitutional analysis of the rights and obligations involved" (2014) 17 *PELJ* 1207 1220, 1222-1223, 1231-1235.
[1071] Kruger (2014) *SALJ* 340.
[1072] *Grobler v Msimang* 2008 3 ALL SA 549 (W) para 132; *Ndlovo v Ngcobo and Bekker v Jika* 2003 1 SA 113 (SCA) para 23.

Elizabeth Municipality v Various Occupiers[1073] the Constitutional Court held that the court's function is not to establish a hierarchy of rights between section 25 and section 26 of the Constitution but rather to "balance out and reconcile opposed claims in as just a manner as possible, taking into account all the interests involved and the specific factors relevant in each particular case".[1074] However, in some instances the application of PIE results in individual property owners having to bear disproportionate harsh and excessive burdens for the sake of some public purpose.[1075] In principle, this amounts to arbitrary deprivations of property that are invalid and unconstitutional for being inconsistent with section 25(1) of the Constitution.[1076] The outcome in the *Modderklip* cases serves as an example of where the effect of a regulatory burden, such as the application of the provisions of PIE, may in some instances render the deprivation of property substantively arbitrary.[1077]

Accordingly, in light of the *ubi jus ibi remedium* principle,[1078] certain procedural and substantive recommendations are proposed that may promote or better ensure the realisation of effective relief for all parties involved in the eviction process.

3 Recommendations

3 1 Introduction

In light of the three phases of the eviction process - the procedural, adjudicatory and execution phase respectively, particular recommendations are suggested that may, as a whole, ensure that effective relief is provided. In this regard, certain procedural suggestions in relation to the eviction process are discussed. Furthermore, the choice of oversight model and the formulation of the structural interdict may also contribute to the realisation of effective relief. In cases where the structural interdict does not

[1073] 2005 1 SA 217 (CC).
[1074] *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 23; K Bezuidenhout *Compensation for excessive but otherwise lawful regulatory State action* LLD Stellenbosch University (2015) 247.
[1075] Bezuidenhout *Compensation for excessive State action* 129.
[1076] *First National Bank of South Africa Ltd t/a Wesbank v Commissioner South African Revenue Service; First National Bank of South Africa Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC); Strydom & Viljoen (Maass) (2014) *PELJ* 1209. See in general Van der Walt *Constitutional Property Law* 190-333. See also Roux "Property" in *CLOSA* 46-17-46-28; Strydom & Viljoen (Maass) (2014) *PELJ* 1207 1220, 1222-1223, 1231-1235.
[1077] Bezuidenhout *Compensation for excessive State action* 250.
[1078] *Minister of the Interior v Harris* 1952 4 SA 769 (A) 781; Kruger (2014) *SALJ* 358.

provide for effective relief, alternative relief is needed. Compensation in the form of indirect or direct constitutional damages seems to provide effective relief to some extent. Accordingly, in light of the single-system-of-law concept[1079] and subsidiarity principles[1080] two options are proposed. Firstly, it is recommended that PIE be amended to include an automatic or discretionary right of compensation to cater for situations where there has been an unreasonable delay in the execution of an eviction order. In the event that such an amendment is not effected, it is recommended secondly, that a general framework for the use of direct constitutional damages be developed.

3 2 Procedural suggestions during the eviction process

In terms of the procedural phase,[1081] the identification and joinder of the correct and relevant State officials or departments from the outset should be regarded as the first step and safeguard in ensuring that effective relief is ultimately achieved. This step ensures that there is not an unnecessary additional delay in the execution of a court order, as was the case in *Pheko 2*.[1082] This step also ensures that the State cannot later aver that they had no knowledge of the order against them, whether it be an order *ad factum praestandum* or *ad pecuniam solvendam*. In this regard, joinder is not a remedy in itself, but rather a procedural safeguard for the effective execution of court orders that follow.

[1079] *Ex Parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa* 2000 2 SA 674 (CC) para 44; Van der Walt *Property and Constitution* 19-20; AJ van der Walt "Normative pluralism and anarchy: Reflections on the 2007 term" (2008) 1 *CCR* 77.
[1080] Van der Walt *Property and Constitution* 36, 40-43, 81-91.
[1081] The procedural phase is characterised by the necessary procedural steps that need to be taken by an owner (or a person in charge) or organ of State, in accordance with the Prevention of Illegal Eviction from Unlawful Occupation of Land Act 19 of 1998 in order to launch an application for eviction of the unlawful occupier(s) from private or public land. See sections 4, 5 and 6 of the PIE in this regard.
[1082] *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* 2015 6 BCLR 711 (CC). See Chapter 4 at 3 1.

In terms of the adjudicatory phase[1083] and in cases where it is appropriate to award a structural interdict[1084] it may be more appropriate to award a structural interdict *before* awarding an eviction order, given the outcome in *Olivia Road*.[1085] In this regard, it is proposed that the structural interdict be employed during the procedural phase of the eviction process. Allowing the affected parties to engage meaningfully with each other with a view of exploring mutually acceptable solutions[1086] may increase the likelihood thereof that the rights of the respective parties will be realised. Once a mutually acceptable solution to the dispute is reached, a court may award an eviction order in terms of PIE. In other words, a plan to realise the respective rights of the parties is agreed to and set out *before* an eviction order is granted by the court. Provided that the solution crafted by the parties is reasonable and lawful the agreement may be seen as a self-imposed remedy that is more likely to be executed. Where the eviction order is consequently granted by the court and the agreement between the parties is set in motion, a further structural interdict may be used during the execution phase[1087] to supervise the progress of the plan and to ensure that the parties adhere to their proposed solutions. This leaves room for the use of the structural interdict *after* an eviction order has been granted. Accordingly, to realise effective relief, a structural interdict may be viable both before and after the granting of an eviction order. Ideally,

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[1083] The adjudicatory phase entails a substantive determination by the court whether it is appropriate, just and equitable, after considering all the relevant circumstances of the case as required by the Prevention of Illegal Eviction of Unlawful Occupation of Land Act 19 of 1998, to grant an eviction order - see sections 4(6) and 6(1) respectively. See for example *Pitje v Shibambo* 2016 4 BCLR 460 (CC); *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 6 SA 294 (SCA); *Mahogany Ridge 2 Property Owners Association v Unlawful Occupiers of Lot 13113 Pinetown* 2013 2 All SA 236 (KZD); *Johannesburg Housing Corporation (Pty) Ltd v The Unlawful Occupiers of the Newtown Urban Village* 2013 1 SA 583 (GSJ). See also in general Liebenberg *Socio-Economic Rights* 268-316, 349-351.

[1083] Sections 4(6)-4(8), 5(1) and 6(3) respectively of the Prevention of Illegal Eviction of Unlawful Occupation of Land Act 19 of 1998.

[1084] See Chapter 2 at 3 5 above.

[1085] See Chapter 2 at 4 5 above.

[1086] *Occupiers of Olivia Road Berea Township and 197 Main Street Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC) and Liebenberg *Socio-Economic Rights* 418-424.

[1087] The execution phase is only applicable when an eviction order was granted by the court. In line with PIE, just and equitable dates, depending on the facts and circumstances of the case, are also set for (a) eviction and (b) the execution of the eviction order. Where the land or property is vacated voluntarily on the date set, the eviction process is complete. However, when the land or property is not vacated as required, the eviction order is executed on a further date, as set out in the eviction order. This execution phase is invariably effected with the assistance of the South African Police Force or other State agents or officials and involves the removal of unlawful occupiers from the land or property in question. It is increasingly clear that an eviction order cannot be executed, unless the State provides some land: *Modder East Squatters v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa v Modderklip Boerdery* 2004 3 All SA 169 (SCA) para 26.

the structural interdict should be employed before the adjudicatory phase and during the execution phase in order to promote the realisation of effective relief.

From the outset, the court should play an active role in determining the type of State action that would be regarded as acceptable. In this regard, the court should retain jurisdiction over the plans proposed by the State during the procedural and execution phases of the eviction process. During the procedural phase, the court should determine whether the steps or plans proposed by the State are reasonable and lawful.[1088] In this regard, the court should guide the State to "rule out options that are inherently incompatible with the transformative purpose of the Constitution".[1089] During the execution phase, the court should oversee that the steps or plans formulated by the State are adequately implemented in due course.

During the procedural and/or execution phases, the model for supervision used and the formulation of the structural interdict may also have an impact on whether effective relief is realised.

3 3 The choice of oversight model

The court's supervisory role is important throughout the provision of structural relief.[1090] In this regard, the courts have a choice between various models for oversight in terms of which the court's oversight may be structured. The court may decide to use the bargaining, public hearing, expert remedial formulation, report back to court or the consensual remedial formulation model or a combination of the models to realise effective relief.[1091] Each of these models provides different processes and methods for oversight. The choice of oversight model is dependent on the specific or changing circumstances of each eviction case. Depending on the circumstances of each case, different parties with different notions of what will constitute effective relief, may

[1088] Viljoen (2015) *SAPL* 68; B Ray "Proceduralisation's triumph and engagement's promise in socio-economic rights litigation" (2011) 27 *SAJHR* 107 114 states that "procedural remedies like engagement promote that kind of dialogue and thus give the courts an important role to play while still democratizing the process of constitutional development. The result is a collaborative model of constitutional development in which courts, citizens and political branches each participate in negotiating the meaning of the Constitution".
[1089] Sections 25(6) and 26 of the Constitution of the Republic of South Africa, 1996; Viljoen (2015) *SAPL* 68.
[1090] Viljoen (2015) *SAPL* 68.
[1091] See Chapter 2 at 3 4 above.

become part of the court proceedings. In this context different affected parties may provide insight and guidance to the courts in determining what will constitute effective relief.

Thus far, the court has primarily used the report back to court model. It is proposed that the courts should explore the use of the other models for oversight which may provide different ways of realising effective relief. In this regard, the particular model for oversight used, may impact on the formulation of the structural relief. Accordingly, the model used for oversight and the formulation of the structural interdict must be structured and used in such a way that combined, they will suit the very specific circumstances of each eviction case so as to provide effective relief.

3 4 The formulation of the structural interdict

"Structural interdicts can be structured to reach specific goals".[1092] Where a structural interdict is formulated in a very specific manner or by way of restrictive terms it poses the risk that the remedy may become obsolete if changing circumstances necessitate a drastic adaption thereof or calls for an alternative remedy. Accordingly, depending on a number of factors, for example, the willingness and the attitudes of the parties and the personal circumstances of the unlawful occupiers, the formulation of the structural interdict will vary. For instance, if the attitudes of the parties are of a recalcitrant nature and the eviction order will render the unlawful occupiers homeless, it may be necessary for the court to formulate the structural interdict in a form of a command, which leaves little room for dialogue and negotiations between the parties. However, if the attitudes of the parties are of a cooperative nature and the eviction order will not necessarily render the unlawful occupiers homeless, then it is proposed that the court formulate its orders in such a way that it may leave room for negotiations and meaningful engagement between the parties. In this regard, the court identifies issues that have to be discussed between the parties, but it does not direct the parties in detail how to do so.

Strydom recommends that relief should be formulated to address the "systemised reform of the [S]tate's conception of the content of section 26(1) and its obligations in

[1092] Viljoen (2015) *SAPL* 66.

relation to this right - that is, section 26(2)".[1093] She suggests that the structure of this form of relief should consist of a number of different facets. Firstly, the formulation of the structural interdict should incorporate a declaratory order in cases where the State is in contravention of the Constitution and infringed section 26 rights. The right to access to housing will be contravened when there is a failure to assist evictees post-eviction with access to alternative accommodation, or at the very least, suitable land for resettlement. It is crucial that the court identify the State action that amounted to the violation of constitutional rights. The identification of the State action responsible for the violation(s) should create some awareness regarding the meaning of reasonable State action.[1094] Secondly, the formulation of the structural interdict "should be directed at the prioritisation of the"[1095] unlawful occupiers. Meaningful engagement, as it was formulated in *Olivia Road*, should be used by the State to determine the specific circumstances and needs of those facing eviction and homelessness.[1096] Thirdly, the formulation of the structural interdict should be directed at the vindication of constitutional rights by the State.[1097] Various models for supervision, alluded to above, can be used in this regard.[1098] Ordinarily, the court will order the State to formulate a comprehensive plan based on the knowledge ascertained during meaningful engagement.[1099] The plan may be structured to include successive phases which could lead to long-term housing solutions in accordance with section 26(1) of the Constitution. In accordance with section 25(5) and (6) of the Constitution, these solutions must also address (a) access to land; and (b) tenure security. The former requires finding and designating suitable land to unlawful occupiers and the latter requires a solution that transforms gross tenure insecurity into legally secure tenure.[1100]

Where there is a lack of adherence to the plan formulated before and after the execution of the eviction order, which results in an unreasonable delay in the realisation of rights, alternative relief is needed.

[1093] Viljoen (2015) *SAPL* 66.
[1094] Viljoen (2015) *SAPL* 66.
[1095] Viljoen (2015) *SAPL* 66-67.
[1096] Viljoen (2015) *SAPL* 66-67.
[1097] Viljoen (2015) *SAPL* 67.
[1098] See Chapter 2 at 3 4 above.
[1099] Viljoen (2015) *SAPL* 67.
[1100] Viljoen (2015) *SAPL* 67.

3 5 Alternative relief

3 5 1 Background

Courts cannot be allowed to condemn situations where an unreasonable delay in the execution of an eviction order negates the realisation of effective relief. Accordingly, in light of the single-system-of-law concept and subsidiarity principles, it is proposed that there are two options available to the court. The first option available to the court it to declare PIE unconstitutional and invalid to the extent that it does not afford a land owner a compensatory remedy against the State for loss incurred due to an unreasonable delay in the execution of an eviction order. In this regard, it is proposed that PIE be amended to include a compensatory mechanism. If PIE provided for a compensatory remedy to address instances where there is a disproportionate and continued violation of the land owner's property rights, then the land owner instituting a claim for the eviction of the unlawful occupiers, would have to rely on the provisions of PIE to protect his or her property rights.[1101]

In the absence of a regulatory compensatory mechanism in PIE, the alternative and second option for the court would be to step in and award constitutional relief such as direct constitutional damages. In this regard, it is proposed that a general framework for awarding direct constitutional damages be developed. These recommendations are accordingly explored.

3 5 2 The amendment of PIE

PIE serves an important public purpose, especially in ensuring that evictions take place in a humane and constitutional manner.[1102] However, Kruger argues that PIE fails to strike a proper balance between the right of the land owner and the rights of the unlawful occupier(s).[1103] Apart from PIE's Preamble, it is only concerned with section 26(3) rights and not with section 25(1) rights.[1104]

[1101] Van der Walt *Property and Constitution* 36; Kruger (2014) *SALJ* 329; Strydom *A hundred years of demolition orders* (2012) 350.
[1102] *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 19; Pienaar *Land Reform* (2014) 667-670, 688.
[1103] Kruger (2014) *SALJ* 328; 339-340.
[1104] Kruger (2014) *SALJ* 328; 339-340.

Currently, PIE does not provide for situations where there has been an unreasonable delay in the execution of an eviction order. The unreasonable delay may result in an indefinite period of unlawful occupation which extends beyond that which can be reasonably expected of a private land owner to endure without compensation.[1105] In this regard, it may be unfair to expect of private land owners "to bear the harsh and disproportionate burden that results from a regulatory measure,"[1106] such as PIE, in the public interest, without compensation. Accordingly, it is proposed that PIE be amended to include a compensatory mechanism which may reduce the disproportionate burden placed on the land owner.[1107]

While the courts have a variety of remedies available at their disposal,[1108] it is not for the courts to determine how the legislation should be amended, for that is the role of the legislature.[1109] In this regard, it is recommended that PIE be amended to provide for an automatic[1110] or discretionary right of compensation.[1111] Both proposed amendments may provide effective relief to the land owner. These two proposed amendments are set out briefly below.

3 5 2 1 An automatic right of compensation

PIE may be amended to provide for an automatic right of compensation, whenever the execution of an eviction order is unreasonably delayed and amounts to an indefinite deprivation of the land owner's property. Accordingly, where a court finds that there has been an unreasonable delay in the execution of an eviction order, an automatic

[1105] Bezuidenhout *Compensation for excessive State action* 204, 213; Kruger (2014) *SALJ* 362.
[1106] Bezuidenhout *Compensation for excessive State action* 204.
[1107] Bezuidenhout *Compensation for excessive State action* 204, 212-213 252-253 See Van der Walt *Constitutional Property Law* 277-280, 367; Stydom *A hundred years of demolition orders* 329, 350-351 and Bishop "Remedies" in *CLOSA* 9-151 in this regard.
[1108] Section 38 read with section 172(1)(b) of the Constitution of the Republic of South Africa, 1996; *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) paras 18 and 33. See also *Fose v Minister of Safety and Security* 1997 7 BCLR (CC) para 69; Bishop "Remedies" in *CLOSA* 9-65-9-78; Mbazira *Strategies for effective implementation* 5; Liebenberg *Socio-Economic Rights* 377-461.
[1109] Kruger (2014) *SALJ* 359; 361-362; *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 41.
[1110] Kruger (2014) *SALJ* 361.
[1111] Kruger (2014) *SALJ* 363.

right of compensation on the part of the claimant exists. Such a right will only be subject to the determination of the *quantum* by the court. [1112]

3 5 2 2 A discretionary right of compensation

PIE may be amended to include a discretionary right of compensation in cases where an eviction order is not executed within a reasonable time. Accordingly, where a court finds that there has been an unreasonable delay in the execution of a court order, it will have to determine whether the claimant has a right to claim compensation. In other words, the court has the discretion, in terms of PIE, to determine whether it will be just and equitable, in light of the unique circumstances of each case, to award compensation to the land owner.[1113]

Arguably, some of the factors akin to those listed in section 25(3) of the Constitution[1114] could serve as a guide for the court in determining whether to award compensation.[1115] Accordingly, the following non-exhaustive list of factors can be included in the amendment of PIE: [1116] (a) the current use of the land;[1117] (b) the history of the acquisition of the property;[1118] (c) the use of the land before it was unlawfully occupied;[1119] (d) the actual loss suffered as a consequence of the continued unlawful occupation;[1120] (e) the length of time the land has been unlawfully occupied after an eviction order was granted;[1121] (f) the degree to which the delay in the execution of the eviction order could be attributed to the land owner;[1122] (g) the degree to which the delay in the execution of the eviction order could be attributed to the State;[1123] (h) the extent of the steps taken by the land owner during the eviction process;[1124] (i) the steps

[1112] Kruger (2014) *SALJ* 361.
[1113] Kruger (2014) *SALJ* 363.
[1114] Section 25(3) of the Constitution of the Republic of South Africa, 1996 provides "the amount of compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances".
[1115] Kruger (2014) *SALJ* 363.
[1116] Kruger (2014) *SALJ* 363.
[1117] Section 25(3)(a) of the Constitution of the Republic of South Africa, 1996.
[1118] Section 25(3)(b) of the Constitution of the Republic of South Africa, 1996.
[1119] Kruger (2014) *SALJ* 363.
[1120] Kruger (2014) *SALJ* 363; *MEC for the Department of Welfare v Kate* 2004 6 SA 40 (SCA) para 25.
[1121] Kruger (2014) *SALJ* 363.
[1122] Kruger (2014) *SALJ* 363.
[1123] Kruger (2014) *SALJ* 363.
[1124] *MEC for the Department of Welfare v Kate* 2004 6 SA 40 (SCA) para 25.

taken by the State during the eviction process; and (j) the availability of alternative relief.[1125]

If such an amendment is effected, the need of the land owner to rely on an award of direct constitutional damages to vindicate his rights will be negated. A land owner will then rely solely on the provisions of PIE to execute an eviction order and claim compensation, which may provide effective relief. However, where such an amendment does not take effect, it becomes necessary to consider the implication of a court's power and discretion to award direct constitutional damages.[1126]

3 5 3 A framework for direct constitutional damages

In accordance with the single-system-of-law concept and subsidiarity principles, *Fose* confirms that direct constitutional damages, as a constitutional remedy is only applicable where indirect remedies such as the interpretation of legislation or the development of the common law are incapable of vindicating infringed constitutional rights.[1127] Furthermore, the court in *Fose* confirms that it is not possible to claim direct constitutional damages over and above the compensation provided for in legislation or the common law if such a remedy already vindicates the claimants right(s) sufficiently.[1128]

However, in the absence of a regulatory framework providing for compensation and in instances where PIE or the law of delict cannot be interpreted or developed to bring it in line with the Constitution,[1129] it becomes necessary for the court to step in and award direct constitutional damages.[1130] In this regard, it is accordingly recommended that the courts must develop the doctrine of direct constitutional damages which will afford

[1125] *MEC for the Department of Welfare v Kate* 2004 6 SA 40 (SCA) para 25. See also Viljoen (2015) *SAPL* 68 who states that: "An obvious example would be for the State to lease privately [owned] land that is unlawfully occupied. The State would act as public sector landlord, while the unlawful occupiers would in fact no longer occupy the land unlawfully. They would occupy the land as public sector tenants. The owner would receive some form of rental income, which the state would have to subsidise. An agreement of this kind can include a range of terms and conditions to suit the specific needs of all the parties involved…Alternatively, the state can expropriate the property".
[1126] Bezuidenhout *Compensation for excessive State action* 213.
[1127] *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) paras 67; 98-99; Bezuidenhout *Compensation for excessive State action* 255.
[1128] *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) para 67; Bezuidenhout *Compensation for excessive State action* 255.
[1129] Section 39(2) of the Constitution of the Republic of South Africa, 1996.
[1130] Bezuidenhout *Compensation for excessive State action* 251.

a land owner a right to claim some measure of compensation from the State.[1131] The Canadian approach to direct constitutional damages as developed in the *Ward* case could be adopted and adapted for use by the South Africa courts. In addition to the four step approach established in *Ward*, the factors listed in *Kate* and/or the proposed factors with regard to the amendment to PIE mentioned above, may also be used to determine whether to award constitutional damages.

It is assumed, that the amendment of PIE or the development of a framework for direct constitutional damages will provide greater judicial certainty in relation to the application for indirect or direct constitutional damages in eviction cases.[1132] The framework may also serve as a guideline for courts to determine whether to award direct constitutional damages. However, while a framework for direct constitutional damages may provide greater judicial certainty and may provide relief to a land owner, it still does not guarantee long term secure tenure for the unlawful occupiers.[1133] Accordingly, direct constitutional damages does not amount to effective relief for all parties involved in the eviction process.

4 Conclusion

Rights are of little value absent a remedy that can be executed within a reasonable time.[1134] It is clear that the landowner's property rights protected by section 25(1) of the Constitution and the unlawful occupiers' rights entrenched in sections 25(5), 25(6), 26(1) and 26(3) of the Constitution have the potential to create conflict.[1135] In this regard, the court's role is not to establish a hierarchical arrangement between the different rights and interests involved, but rather to "balance out and reconcile the opposed claims in as just a manner as possible, taking account of all the interests

[1131] Kruger (2014) *SALJ* 330, 362; Bezuidenhout *Compensation for excessive State action* 251; *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) para 58.
[1132] Barns (2013) *Responsa Meridiana* 21.
[1133] Viljoen (2015) *SAPL* 69-70; Pienaar (2015) *SAPL* 7-8.
[1134] Kruger (2014) *SALJ* 358. See also article 6, the right to a fair trial of the European Convention on Human Rights which holds that "[E]veryone is entitled to a fair and public hearing within a *reasonable time* by an independent and impartial tribunal established by law" read with section 13, the right to an effective remedy which provides that "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."
[1135] S Wilson ""Breaking the tie: Evictions from private land, homelessness and a new normality" (2009) 126 *SALJ* 270; Kruger (2014) *SALJ* 328.

involved and the specific factors relevant in each particular case".[1136] While the court has many remedies available at its disposal, it may still prove to be a complex and difficult task to reconcile these constitutionally protected rights.

Landowners are expected to have a reasonable degree of patience pending the execution of an eviction order.[1137] While patiently waiting for the State to take action and provide land and adequate housing to the unlawful occupiers, land owners' property rights are continuously or, in some cases, indefinitely infringed. Land owners may also suffer massive financial loss in such cases. If one considers the practical difficulties, resource constraints and the time lapse associated with the execution of an eviction order,[1138] the eviction process, as envisaged by PIE, struggles to sufficiently balance out and reconcile opposing claims of the land owners and the unlawful occupiers.[1139] Accordingly, effective relief is needed to realise the respective rights of the parties.

Where an eviction order was granted on the basis that it is just and equitable in the circumstances, ideally, and in theory, an effective remedy will embody immediate execution thereof.[1140] However, in the context of the eviction process, such a remedy only exists in theory. Practically, it may not be possible for the State to execute an eviction order immediately, because land or adequate housing may not be readily available. In this regard, the right to access to housing does not imply that housing is available immediately. Instead it means that the State has to progressively realise the right over a period of time within its available resources, as envisaged in section 26(2) of the Constitution of the Republic of South Africa. Nevertheless, the court should strive to find or forge[1141] the best possible remedy for a particular eviction case.[1142]

[1136] *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 23.
[1137] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 *2 SA 104 (CC) para 100.*
[1138] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 2 SA 104 (CC) para 99.
[1139] Kruger (2014) *SALJ* 329.
[1140] Section 25(1) and sections 26(1) and (3) of the Constitution of the Republic of South Africa, 1996 respectively. In this regard see Van der Walt *Constitutional Property Law* 17-18 and Roux "Property" in *CLOSA* 41-1-41-37; *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC); Liebenberg *Socio-Economic Rights* 344-351; Muller *The impact of section 26 of the Constitution* 75-82, 93-99; McLean "Housing" in *CLOSA* 55-8-55-14.
[1141] *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) para 69.
[1142] Kruger (2014) *SALJ* 328 358; DH Ziegler "Rights require remedies: A new approach to the enforcement of rights in the federal courts" (1987) 38 *Hastings LJ* 665 678; E Ling "From paper

The court will have to decide, having regard to the unique circumstances of each eviction case, which remedy may be the most appropriate and effective.

This thesis set out to establish whether the structural interdict, constitutional damages and/or contempt of court proceedings may provide effective relief to the parties in a given case. While these remedies may provide some relief to the respective parties, each remedy has inherent problems. In this regard particular amendments aimed at procedural and substantive matters are necessary. These amendments have been addressed by way of particular recommendations regarding the amendment of PIE and the development of a framework for direct constitutional damages. The structural interdict, constitutional damages and contempt of court proceedings are furthermore all remedies that are time-consuming and take up a lot of State and private resources that could have been used for other, more pressing, problems.

Despite the inherent problems, it was found that both structural interdicts and constitutional damages may be regarded as effective relief depending on the unique circumstances of each eviction case. Contempt of court proceedings, as a means of enforcing the execution of the structural interdict or constitutional damages may also have a role to play in the realisation of effective relief. The circumstances of a particular case may require that different remedies be used at different stages of the eviction process[1143] and/or that the remedies discussed in this thesis be used in conjunction with each other. In other words, it may be necessary to use a structural interdict before and after granting an eviction order to realise the respective rights of the land owner and the unlawful occupiers in practice. Constitutional damages may also be used as a primary or alternative remedy to realise the respective rights of the land owner and the unlawful occupiers. It may even be necessary to use a structural interdict *and* compensate a land owner for the loss of his property to ensure the realisation of effective relief. Contempt of court may be raised by the court or the parties in cases where there is a failure to give effect to a structural interdict and/or constitutional

promises to real remedies: The need for the South African Constitutional Court to adopt structural interdicts in socio-economic rights cases" (2015) 9 *HKJLS* 51 52; S Liebenberg "South Africa's Evolving Jurisprudence on Socio-Economic Rights: An effective tool in challenging poverty?" (2002) 6 *Law, Democracy and Development* 1; DE Hirsch "A defence of structural injunctive remedies in South African law" (2007) 9 *Oregon Review of International Law* 1 14-15.

[1143] See Chapter 1 at 1 above.

damages order. Contempt of court then serves as a means of realising the remedy granted by the court.

Because problems identified in the thesis require attention at legislative and conceptual levels, existing remedies have to prevail at present. The study has shown that a *combination* of procedures and remedies, set out in the thesis, may be necessary for effective relief to be realised presently.

Abbreviations List

ADVOC Q	Advocates' Quarterly
Advocates' QR	Advocates' Quarterly Review
AHRLJ	African Human Rights Law Journal
ASSAL	Annual Survey of South African Law
Cambridge Student LR	Cambridge Student Law Review
CCR	Constitutional Court Review
CLOSA	Constitutional Law of South Africa
Connecticut LR	Connecticut Law Review
ESR Review	ESR Review Economic and Social Rights in South Africa
Georgetown LJ	Georgetown Law Journal
Harvard LR	Harvard Law Review
Hastings LJ	Hastings Law Journal
HKJLS	Hong Kong Journal of Legal Studies
HRLR	Human Rights Law Review
IJCL	International Journal of Constitutional Law
LAWSA	The Law of South Africa
Litnet	Litnet Akademies
NYLR	New York Law Review
PELJ	Potchefstroom Electronic Law Journal
San Diego LR	San Diego Law Review
SALJ	South African Law Journal
SAJHR	South African Journal on Human Rights
Stell LR	Stellenbosch Law Review
SAPL	Southern African Public Law
TSAR	Tydskrif vir Suid-Afrikaanse Reg
UCLA LR	UCLA Law Review
University of Florida LR	University of Florida Law Review
University of Pennsylvania LR	University of Pennsylvania Law Review
Washington LR	Washington Law Review
Washington and Lee LR	Washington and Lee Law Review

Bibliography
Books

Badenhorst PJ, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006), South Africa: Lexisnexis.

Baxter L *Administrative Law* (1984), South Africa: Juta & Co.

Berryman J *The law of equitable remedies* (2013), Canada: Irwin Law.

Braithwaite J *Restorative Justice and Responsive Regulation* (2002), Oxford: Oxford University Press.

Cilliers AC, C Loots & HC Nel *Herbstein and Van Winsen: The civil practice of the High Courts and the Supreme Court of Appeal in South Africa 2* 5 ed (2009), Cape Town: Juta & Co.

Currie I & J de Waal *The Bill of Rights Handbook* 6 ed (2013), Cape Town: Juta & Co.

Du Plessis M, G Penfold & J Brickhill *Constitutional Litigation* (2013), Cape Town: Juta & Co.

Fiss O *The civil rights injunction* (1978), Yale University: Indiana University Press.

Hoexter C *Administrative Law in South Africa* (2007), Cape Town: Juta & Co.

Hoexter C *Administrative law in South Africa* 2 ed (2012) Cape Town: Juta & Co.

Horowitz DL *The courts and social policy* (1977), Washington D.C: The Bookings Institution.

Liebenberg S *Socio-Economic Rights: Adjudication under a transformative Constitution* (2010), Cape Town: Juta & Co.

Loubser M, R Midgley , A Mukheiber , L Niesing & D Perumal *The Law of Delict In South Africa* 2 ed (2012), Cape Town: Oxford University Press Southern Africa.

Mbazira C *Litigating Socio-Economic Rights in South Africa: A choice between corrective and distributive justice* (2009), University of Pretoria: Pretoria University Law Press (PULP).

Mbazira C *You are the "weakest link" in realising socio-economics rights: Goodbye: Strategies for effective implementation of court orders in South Africa* (2008), Belville: Socio-Economic Rights Community Law Centre, University of Western Cape.

Mostert H & A Pope (eds) Badenhorst PJ, W Freedman, JM Pienaar & J van Wyk *The principles of The Law of Property in South Africa* (2010), Cape Town: Oxford University Press.

O'Connell P *Vindicating Socio-economic rights: International Standards & Comparative Experiences* (2012), USA & Canada: Routledge.

Pienaar JM *Land Reform* (2014), Cape Town: Juta & Co.

Prest B *The law and practice of interdicts* 4 ed (2009), Cape Town: Juta & Co.

Van der Walt AJ *Constitutional Property Law* 3 ed (2011), Cape Town: Juta & Co.

Van der Walt AJ & GJ Pienaar *Introduction to the Law of Property* 7 ed (2016), Cape Town: Juta & Co.

Van der Walt AJ *Property and Constitution* (2012), Pretoria: Pretoria University Law Press (PULP).

Chapters in edited collections

Budlender G "Remedying Breaches of the Constitution: Chapter 10" in J Klaaren *A Delicate Balance: The place of the Judiciary in a Constitutional Democracy* (2006) 83-97, Siber Ink.

Roach K "Crafting remedies for violations of economic, social and cultural rights" in J Squires, M Langford & B Thiele (eds) *The road to a remedy: Current issues in the litigation of economic, social and cultural rights* (2005) 111-126, Australian Human Rights Centre.

Roach K "The Challenges of Crafting Remedies for the Violations of Social, Economic and Cultural Rights" in M Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2009) 46-58, Cambridge University Press.

Loose-leaf publications

Bishop M "Remedies" in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (RS 6 2014) 9-1-9-199.

Klaaren J "South African Human Rights Commission" in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (RS 1 2005) 24C-2-24C-18.

McLean K "Housing" in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (OS 7 2006) 55-1-55-54.

Pienaar JM & J Brickhill "Land" in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (OS 3 2007) 48-1-48-34.

Roux T "Property" in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (OS 12 2003) 41-1-41-37.

Van der Merwe C "Things" in WA Joubert & FA Faris (eds) *The Law of South Africa* 2 ed (RS 1 2014) 3-350.

Unpublished sources

Cloete CT *A critical analysis of the approach of the court in the application of eviction remedies in the pre- and post-constitutional context* LLM Stellenbosch University (2016 forthcoming).

Dhliwayo P & AJ van der Walt "The notion of absolute and exclusive ownership" *SALJ* (2016 forthcoming).

Theses or dissertations

Batchelor BL *Constitutional Damages for the Infringements of a Social Assistance Right in South Africa: Are monetary damages in the form of interest a just and equitable remedy for the breach of a social right?* LLM Stellenbosch University (2011).

Bezuidenhout K *Compensation for excessive but otherwise lawful regulatory state action* LLD Stellenbosch University (2015).

Dhliwayo P *A constitutional analysis of access rights that limit landowners' right to exclude* LLD Stellenbosch University (2015).

Lawrence R *The impact of supervisory orders and structural interdicts in South Africa* LLM University of the Western Cape (2012).

Muller G *The impact of section 26 on the Eviction of Squatters in South African Law* LLD Stellenbosch University (2011).

Ntlama NP *The implementation of court orders in respect of socio-economic rights in South Africa* LLM Stellenbosch University (2003).

Strydom J *A hundred years of demolition orders: A constitutional analysis* LLD Stellenbosch University (2012).

Van der Sijde E *Reconsidering the relationship between property and regulation: A systemic constitutional approach* LLD Stellenbosch University (2015).

Wessels LN *Tenuitvoerlegging van hofbevele teen die Staat* LLM Stellenbosch University (2006).

Law journal articles

Barns S "Constitutional damages: A call for the development of a framework in South Africa" (2013) *Responsa Meridiana* 1-22.

Boggenpoel ZT "Does method really matter? Reconsidering the role of common law remedies in the eviction paradigm" (2014) 7 *Stellenbosch Law Review* 72-98.

Boggenpoel ZT & JM Pienaar "The continued relevance of the *mandament van spolie*: recent developments relating to dispossession and eviction" (2013) 46 *De Jure* 998-1021.

Boonzaaier L "State Liability in South Africa: A more direct approach" (2013) 130 *South African Law Journal* 330-368.

Budlender B "Access to Courts" (2004) 121 *South African Law Journal* 339-358.

Bulbulia S "Making the state pay for its misdeeds: the law" (2011) 11 *Without Prejudice* 36-38.

Chayes A "The role of the judge in public law litigation" (1979) 89 *Harvard Law Review* 1281-1316.

Chenwi L & S Liebenberg "The constitutional protection of those facing eviction from "bad buildings": case review" (2008) 9 *ESR Review: Economic and Social Rights in South Africa* 12-17.

Chenwi L & K Tissington "'Sacrificial Lambs' in the quest to eradicate informal settlements. The plight of the Joe Slovo residents: case review" (2009) 10 *ESR: Economic and Social Rights in South Africa* 18-24.

Chenwi L "'Meaningful engagement' in the realization of socio-economic rights: the South African experience" (2011) 26 *Southern African Public Law* 128-156.

Chenwi L "Government's obligation to unlawful occupiers and private landowners" (2010) 11 *ESR Review: Economic and Social Rights in South Africa* 9-11.

Chenwi L "A new approach to remedies in socio-economic rights adjudication: *Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others*" (2009) 2 *Constitutional Court Review* 371-393.

Chenwi L "Putting flesh on the Skeleton: South African Judicial Enforcement of the Right to Adequate Housing for those subject to Evictions" (2008) 8 *Human Rights Law Review* 105-137.

Chenwi L "Upgrading of informal settlements and the rights of the poor: the case of Joe Slovo: case review" (2008) 9 *ESR Review: Economic and Social Rights in South Africa* 13-18.

Chetty MR "The applicability of the Prevention of Illegal Eviction Act: cases" (2002) 3 *ESR Review: Economic and Social Rights in South Africa* 14-17

Christmas A "The *Modderklip* case: the state's obligations in evictions instituted by private landowners: case review" (2005) 4 *ESR Review: Economic and Social Rights in South Africa* 6-10.
Christmas A "Property rights of landowners v socio-economic rights of occupiers: case review" (2004) 5 *ESR Review: Economic and Social Rights in South Africa* 11-13.

Christmas A "The Modderklip cases: evictions and the right of access to adequate housing: case review" (2003) 6 *ESR Review: Economic and Social Rights in South Africa* 4-7.

Cox A "The new dimension of constitutional adjudication" (1976) 51 *Washington Law Review* 791-830.

Davis DM "The relationship between courts and the other arms of government in promoting and protecting socio-economic rights in South Africa: What about separation of power?" (2012) 15 *Potchefstroom Electronic Law Journal* 1-14.

Davis DM "Adjudicating the Socio-economic Rights in the South African Constitution towards 'deference lite'" (2006) 22 *South African Journal on Human Rights* 301-327.

Davis D "Socio-economic rights in South Africa: The record of the Constitutional Court after 10 years" (2004) 5 *ESR Review: Economic and Social Rights in South Africa* 3-7.

De Beer RJ & S Vettori "The enforcement of socio-economic rights" (2007) 3 *Potchefstroom Electronic Law Journal* 2-26.

De Vos P "Between moral authority and formalism: *Nyathi v Member of Executive Council for the Department of Health, Gauteng*" (2009) 2 *Constitutional Court Review* 409-427.

Dickinson GS "The *Blue Moonlight* remedy: formulating the voucher scheme into a new emergency housing remedy in South Africa" (2013) 130 *South African Law Journal* 554-596.
Dickinson GS "Blue Moonlight Rising: evictions, alternative accommodation and a comparative perspective on affordable housing solutions in Johannesburg" (2011) 27 *South African Journal on Human Rights* 466-495.

Du Plessis A & A van den Berg "Some perspectives on constitutional conflict in local disaster management through the lens of *Pheko v Ekurhuleni Metropolitan Municipality* 2012 2 SA 598 (CC): case note" (2013) 28 *Southern Africa Public Law* 448-468.

Dyal-Chand R “Sharing the Cathedral” (2013) 46 *Connecticut Law Review* 647-723.

Ebadolahi M “Using structural interdicts and the South African Human Rights Commission to achieve judicial enforcement of economic and social rights in South Africa” (2008) 5 *New York Law Review* 1565-1606.

Euijen M & C Plasket “Constitutional Protection of Property and Land Reform” (2005) *Annual Survey of South African Law* 402-415.

Frug E “The judicial power of the purse” (1978) 126 *University of Pennsylvania Law Review* 715-794.

Funnah AK & O Sibanda “Towards a selective awarding of punitive damages awards in South Africa? A comment on *Fose v Minister of Safety and Security*” (2008) 48 *Codicillus* 36-49.

Ganesh A “Contempt and execution in vindicating the right to education” (2014) 29 *Southern African Public Law* 19-36.

Gillespie N *Charter Remedies: The Structural Injunction* (1989-1990) 11 Advocates' Quarterly 190-221.

Grossenbacher K “Implementing Structural Injunctions: Getting a remedy when local officials resist (1992) 80 *George Town Law Journal* 2227-2258.

Hausman D “When and why the South African government disobeys Constitutional Court orders” (2012) 48 *Stanford Journal of International Law* 437-455.

Hirsch DE “A defence of structural injunctive remedies in South African law” (2007) 9 *Oregon Review of International Law* 1-66.

Hoexter C “The future of judicial review in South African administrative law” (2000) 117 *South African Law Journal* 484-519.

Hunt CDL "Case Note: Constitutional Damages in the Supreme Court of Canada" (2011) 115 *Cambridge Student Law Review* 115-120.

Khoza S "Questioning the wisdom of moving 40 000 people: the Modderklip saga continues: case review" (2005) 6 *ESR Review: Economic and Social Rights in South Africa* 10-11.

Kruger M "Arbitrary deprivation of property: an argument for the payment of compensation by the state in certain cases of unlawful occupation" (2014) 131 *South African Law Journal* 328-364.

Kruuse H "The art of the possible in realising socio-economic rights: the SCA decision in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties (Pty) Ltd: notes*" (2011) 128 *South African Law Journal* 620-632.

Liebenberg S "Remedial Principles and Meaningful Engagement in Education Rights Disputes" (2016) 19 *Potchefstroom Electronic Law Journal* 1-43.

Liebenberg S "Engaging the paradoxes of the universal and particular in human rights adjudication: The possibilities and pitfalls of meaningful engagement" (2012) 12 *African Human Rights Law Journal* 1-30.

Liebenberg S "The value of human dignity in interpreting socio-economic rights" (2005) 21 *South African Journal on Human Rights* 1-31.

Liebenberg S "South Africa's Evolving Jurisprudence on Socio-Economic Rights: An effective tool in challenging poverty?" (2002) 6 *Law, Democracy and Development* 159-191.

Linden A "Charter Damages Claims: New Dawn or Mirage" (2012) *Advocates' Quarterly Review* 426-439.

Ling E "From Paper promises to real remedies: The need for the South African Constitutional Court to adopt structural interdicts in socio-economic rights cases" (2015) 9 *Hong Kong Journal of Legal Studies* 51-70.

Love JC “Presumed general compensatory damages in constitutional tort litigation: A corrective justice perspective” (1992) 49 *Washington and Lee Law Review* 67-91.

Love JC “Damages: A remedy for the violation of constitutional rights” (1979) 67 *California Law Review* 1242-1285.

MacDonnell Chilemba E “Evictions in South Africa during 2014- an analytical narrative: feature” (2015) 16 *ESR Review: Economic and Social Rights in South Africa* 3-6.

Malherbe R & M van Eck “State non-compliance with legal duties: The Constitutional Court finally cracks the whip” (2009) *Tydskrif vir Suid-Afrikaanse Reg* 191-198.

Mbazira C “An Overview of the Constitutional Court hearing of inner-city evictions case” (2007) 8 *ESR Review: Economic and Social Rights in South Africa* 12-16.

Mbazira C “From ambivalence to certainty: Norms and principles for the structural interdict in socio-economic rights litigation in South Africa” (2008) 24 *South African Journal on Human Rights* 1-28.

Mbazira C “Non-implementation of court orders in socio-economic rights litigation in South Africa: Is the cancer here to stay?” (2008) 9 *ESR Review: Economic and Social Rights in South Africa* 2-8.

McLean K “Meaningful engagement: on step forward or two back? Some thoughts on Joe Slovo” (2010) 3 *Constitutional Court Review* 223-242.

Mirugi-Mukundi G “Case Review- fundamental constitutional value of accountability requires municipal officials to obey court orders: feature” (2015) 16 *ESR Review: Economic and Social Rights in South Africa* 7-8.

Mohamed I “The Role of the Judiciary in a Constitutional State” (1998) 115 *South African Law Journal* 111-115.

Muller G & S Liebenberg “Developing the law of joinder in the context of evictions of people from their homes” (2013) 59 *South African Journal on Human Rights* 554-570.

Muller G “Evicting unlawful occupiers for health and safety reasons in post-apartheid South Africa” (2015) 132 *South African Law Journal* 616-638.

Muller G “On considering alternative accommodation and the rights and needs of vulnerable people” (2014) 30 *South African Journal on Human Rights* 41-62.

Muller G “Conceptualising “meaningful engagement” as a deliberative democratic partnership” (2011) 22 *Stellenbosch Law Review*742-758

Okpaluba C “The development of Charter Damages Jurisprudence in Canada: Guidelines from the Supreme Court” (2012) 55 *Stellenbosch Law Review* 55-75.

Olivier NJJ & C Williams “State Liability for final orders sounding in money: At long last alignment with the Constitution” (2011) *Obiter* 489-520.

Pienaar JM “Land reform and housing: Reaching for the rafters or struggling with foundations?” (2015) 30 *Southern African Public Law* 1-25.

Pienaar JM & H Mostert “Uitsettings onder die Suid-Afrikaanse grondwet: die verhouding tussen artikel 25(1), artikel 26(3) en die Uitsettingswet (slot)” (2006) 3 *Tydskrif vir Suid-Afrikaanse Reg* 522-536.

Pieters M “Coming to terms with judicial enforcement of socio-economic rights” (2004) 20 *South African Journal on Human Rights* 383-417.

Pillay A “South Africa: Access to land and housing” (2007) 5 *International Journal of Constitutional Law* 544-556.

Plasket C “Protecting the public purse: Appropriate relief and cost orders against State officials” (2000) 117 *South African Law Journal* 151-158.

Pretorius M "The origins of the *functus officio* doctrine, with specific reference to its application in administrative law" (2005) 122 *South African Law Journal* 832-864.

Ramonyai ME "State Liability Amendment Act: Process of attachment (practice note)" (2013) *De Rebus* 20.

Ray B "Courts, capacity and engagement: Lessons from *Hlophe v City of Johannesburg*: feature" (2013) 14 *ESR Review: Economic and Social Rights in South Africa* 3-5.

Ray B "Proceduralisation's triumph and engagement's promise in socio-economic rights litigation" (2011) 27 *South African Journal on Human Rights* 107-126.

Ray B "*Occupiers of 51 Olivia Road v City of Johannesburg*: Enforcing the right to adequate housing through 'engagement'" (2008) 8 *Human Rights Law Review* 703-713.

Rendelman D "The inadequate remedy at law prerequisite for an injunction" (1981) 33 *University of Florida Law Review* 346-358.

Roach K & G Budlender "Mandatory relief and supervisory jurisdiction: when is it appropriate, just and equitable?" (2005) 122 *South African law Journal* 325-351.

Roos R "Executive disregard of court orders: Enforcing judgments against the state" (2006) 123 *South African Law Journal* 744-766.

Roos R "Statutory mechanisms to enforce judgment debts against the state: journal" (2005) 20 *SA Public Law* 167-175.

Rycroft A "Judicial Innovation and the delinquent state: A note on the State and Mfezeko Zuba and 23 similar cases" (2004) 20 *South African Human Rights Journal* 321-330.

Sabel CF & W Simon "Destabilization Right: How Public Law Litigation Succeeds" (2004) 117 *Harvard Law Review* 1016-1053.

Strydom J & S Viljoen (Maass) "Unlawful occupation of inner-city buildings: A constitutional analysis of the rights and obligations involved" (2014) 17 *Potchefstroom Electronic Law Journal* 1206-1261.

Sturm S "A normative theory of public law remedies" (1991) 79 *Georgetown Law Journal* 1355-1446.

Sturm S "Resolving Remedial Dilemma: Strategies of Judicial Intervention in Prisons" (1990) 138 *University of Pennsylvania Law Review* 805-912.

Swanepoel N "Die aanwending van die gestruktureerde interdik in die Suid-Afrikaanse konstitutionele regsbedeling: 'n eiesoortige beregtingsproses" (2015) 12 *Litnet Akademies* 374- 396.

Swart M "Left out in the cold? Crafting constitutional remedies for the poorest of the poor" (2005) 21 *South African Journal on Human Rights* 215-240.

Thomas TA "*Ubi Jus Ibi Remedium*: The Fundamental Right to a Remedy Under Due Process" (2004) 41 *San Diego Law Review* 1633-1636.

Tissington K & S Wilson "SCA upholds rights of urban poor in *Blue Moonlight* judgment: case review" (2011) 12 *ESR Review: Economic and Social Rights in South Africa* 3-6.

Tissington K "Demolishing development at Gabon informal settlement: Public interest litigation beyond Modderklip?" (2011) 27 *South African Journal on Human Rights* 192-205.

Tissington K "Challenging inner city evictions before the Constitutional Court of South Africa: the *Occupiers of 51 Olivia Road* case in Johannesburg, South Africa" (2008) 5 *Housing and ESC Rights Law Quarterly* 1-12.

Trengove W "Judicial Remedies for Violations of Socio-economic Rights" (1999) 1 *ESR Review: Economic and Social Rights in South Africa* 13-18.

Van der Walt AJ "Normative pluralism and anarchy: Reflections on the 2007 term" (2008) 1 *Constitutional Court Review* 77-124.

Van der Walt AJ "The state's duty to protect property owners v the state's duty to provide housing: Thoughts on the *Modderklip* case" (2005) 21 *South African Journal on Human Rights* 144-161.

Van Wyk J "The role of local government in evictions" (2011) 14 *Potchefstroom Electronic Law Journal* 50-83.

Van Wyk J "The relationship (or not) between the rights of access to land and housing: de-linking land from its components" (2005) 16 *Stellenbosch Law Review* 466-487.

Viljoen S "The systemic violation of section 26(1): An appeal for structural relief by the judiciary" (2015) 30 *Southern African Public Law* 42-70.

Walters A "A balancing act between owners and occupants: Is PIE unconstitutional?" (2013) *De Rebus* 22-25.

Wilson S "Litigating Housing Rights in Johannesburg's Inner City: 2004-2008" (2010) 27 *South African Journal of Human Rights* 127-151.

Wilson S "Breaking the tie: Evictions from private land, homelessness and a new normality" (2009) 126 *South African Law Journal* 270-290.

Wilson S "A new dimension to the right to housing: case review" (2006) 7 *ESR Review: Economic and Social Rights in South Africa* 9-13.

Zaring D "National rulemaking through trial courts" (2004) 51 *UCLA Law Review* 1015-1078.

Ziegler DH "Rights require remedies: A new approach to the enforcement of rights in the federal courts" (1987) 38 *Hastings Law Journal* 665-728.

Cases

South African case law

ABSA Bank Ltd v Murray 2004 2 SA 15 (CC).

Bankorp Trust Bpk v Pienaar 1993 4 SA 215 (N).

Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism 2004 4 SA 490 (CC).

.

Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue 2009 1 SA 470 (W).

Candid Electronics (Pty) Ltd v Merchandise Buying Syndicate (Pty) Ltd 1992 2 SA 459 (C).

Carmichele v Minister of Safety and Security 2001 4 SA 938 (CC).

Cashbuild (South Africa) (Pty) Ltd v Scott 2007 1 SA 332 (T).

Chieftain Real Estate Incorporated in Ireland v Tshwane Metropolitan Municipality 2008 5 SA 387 (T).

Chapman's Peak Hotel v O'Hagans 2001 4 ALL SA 415 (C).

City of Cape Town v Rudolph 2004 5 SA 39 (C).

City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties (Pty) Ltd 2011 4 SA 337 (SCA).

City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd 2012 2 SA 104 (CC).

City of Johannesburg Metropolitan Municipality v Hlophe 2015 ALL SA 251 (SCA).

City of Johannesburg v Changing Tides (Pty) Ltd 2012 6 SA 294 (SCA).

City of Johannesburg v Rand Properties (Pty) Ltd 2007 1 SA 78 (W).

City of Johannesburg v Rand Properties (Pty) Ltd 2007 6 SA 417 (SCA).

City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd 2015 6 SA 440 (CC).

EN v The Government of the RSA 2006 JOL 18038 (D).

Fakie NO v CII Systems (Pty) Ltd 2006 4 SA 326 (SCA).

First National Bank of South Africa Ltd t/a Wesbank v Commissioner South African Revenue Service; First National Bank of South Africa Ltd t/a Wesbank v Minister of Finance 2002 4 SA 768 (CC).

Fose v Minister of Safety and Security 1997 7 BCLR (CC).

Government of the Republic of South Africa v Grootboom 2001 1 SA 46 (CC).

Grobler v Msimang 2008 3 ALL SA 549 (W).

Grootboom v Oostenberg Municipality 2000 3 BCLR 277 (C).

Hlope v The City of Johannesburg Metropolitan Municipality 2013 4 SA 212 (GSJ).

Hoffmann v South African Airways 2001 1 SA 1 (CC).

In re Certification of the Constitution of Republic of South Africa (First Certification case) 1996 10 BCLR 1253 (CC).

Jayiya v MEC for Welfare Eastern Cape 2004 2 SA 611 (SCA).

Johannesburg Housing Corporation (Pty) Ltd v The Unlawful Occupiers of the Newtown Urban Village 2013 1 SA 583 (GSJ).

Kate v MEC for the Department of Welfare, Eastern Cape 2005 1 SA 141 (SE).

Kaunda v President of the Republic of South Africa 2005 4 SA 235 (CC).

Kiliko v Minister of Home Affairs 2006 4 SA 114 (C).

Law Society of South Africa v Minister of Transport 2011 1 SA 400 (CC).

Lingwood v The Unlawful Occupiers of R/E of Erf 9 Highlands 2008 3 BCLR 325 (W).

M v Minister of Police of the Government of the Republic of South Africa 2013 5 SA 622 (GNP).

Magidimisi v Premier of the Eastern Cape 2006 JOL 17274 (Ck).

Mahogany Ridge 2 Property Owners Association v Unlawful Occupiers of Lot 13113 Pinetown 2013 2 All SA 236 (KZD).

MC Denneboom Service Station CC v Phayane 2015 1 SA 54 (CC).

McIntosh v Premiere, KwaZulu Natal 2008 6 SA 1 (SCA).

Meadow Glen Home Owners Association v City of Tshwane Metropolitan Municipality 2015 1 All SA 299 (SCA).

MEC Department of Welfare v Kate 2006 4 SA 478 (SCA).

Minister of Education (Western Cape) v Mikro Primary School 2006 1 SA 1 (SCA).

Minister of Health v Treatment Action Campaign (No 2) 2002 5 SA 721 (CC).

Minister of Justice and Constitutional Development v Nyathi 2010 4 SA 567 (CC).

Minister of Police v Mboweni 2014 6 SA 256 (SCA).

Minister of the Interior v Harris 1952 4 SA 769 (A).

Minister of Safety and Security v Van Duivenboden 2002 6 SA 431 (SCA).

Mjeni v Minister of Health and Welfare, Eastern Cape 2000 (4) SA 446 (Tk).

Mkontwana v Nelson Mandela Metropolitan Municipality 2005 1 SA 530 (CC).

Modder East Squatters v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa v Modderklip Boerdery 2004 3 All SA 169 (SCA).

Modderklip Boerdery (Pty) Ltd v Modder East Squatters 2001 4 SA 385 (W).

Modderklip Boerdery (Edms) Bpk v President van die Republiek van Suid-Afrika 2003 1 All SA 465 (T).

Nienaber v Stuckey 1946 AD 1049.

Ndlovu v Ngcobo and Bekker v Jika 2003 1 SA 113 (SCA).

Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape 2001 2 SA 609 (E).

Nyathi v Member of the Executive Council for the Department of Health Gauteng 2008 5 SA 94 (CC).

Occupiers of Mooiplaats v Golden Thread Limited and Others 2012 2 SA 337 (CC).

Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg 2008 3 SA 208 (CC).

Olitzki Property Holdings v State Tender Board 2001 3 SA 1247 (SCA).

Pitje v Shibambo 2016 4 BCLR 460 (CC).

Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of South Africa 2000 2 SA 674 (CC).

Pheko v Ekurhuleni Metropolitan Municipality (No 1) 2012 2 SA 598 (CC).

Pheko v Ekurhuleni Metropolitan Municipality (No 2) 2015 5 BCLR 711 (CC).

Pheko v Ekurhuleni Metropolitan Municipality (No 3) (CCT 19/11) [2016] ZACC 20 (26 July 2016).

Port Elizabeth Municipality v Various Occupiers 2005 1 SA 217 (CC).

President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd 2005 5 SA 3 (CC).

Premier of the Province of the Western Cape v Fair Cape Property Developers (Pty) Ltd 2003 6 SA 13 (SCA).

Pretoria City Council v Walker 1998 2 SA 363 (CC).

Rail Commuter Action Group v Transnet Ltd t/a Metrorail (1) 2003 5 SA 518 (C).

Residents of Joe Slovo Community, Western Cape v Thubelisha Homes 2010 3 SA 454 (CC).

Residents of Joe Slovo Community, Western Cape v Thubelisha Homes 2011 7 BCLR (CC).

Sailing Queen Investments v The Occupants of La Colleen Court 2008 6 BCLR 666 (W).

Setlegelo v Setlegelo 1914 AD 221.

Sibiya v Director of Public Prosecutions, Johannesburg 2007 (2) BCLR 293 (CC).

S v Z and 23 Similar Cases 2004 1 SACR 400 (E).

Steenkamp v Provincial Tender Board of the Eastern Cape 2007 3 BCLR 280 (CC).

Strydom v Minister of Correctional Services 1999 3 BCLR 342 (W).

South African Association of Personal Injury Lawyers v Heath 2001 1 SA 883 (CC).

Thubelisha Homes v Various Occupants 2008 JOL 21559 (C).

Treatment Action Campaign v Minister of Health 2002 4 BCLR 356 (T).

Van Eeden v Minister of Safety and Security 2003 1 SA 389 (SCA).

Zealand v Minister for Justice and Constitutional Development 2008 4 SA 458 (CC).

Foreign case law

American case law

Brown v Board of Education of Topeka 347 US 483 (1954) (*Brown 1*).

Brown v Board of Education of Topeka 349 US 294 (1955) (*Brown 2*).

Canadian case law

Vancouver (City) v Ward 2010 2 SCR 28 (SCC).

Constitutions

Constitution of the Republic of South Africa, 1996.

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982.

Legislation

Disaster Management Act 57 of 2002.

Expropriation Act 63 of 1975.

Home Loan and Mortgage Disclosure Act 63 of 2000.

Housing Act 107 of 1997.

Housing Consumer Protection Measures Act 95 of 1998.

Local Government: Municipal Structures Act 117 of 1998.

Local Government: Municipal Systems Act 32 of 2000.

Magistrate's Court Act 32 of 1944.

National Building Regulations and Building Standards Act 103 of 1997.

Rental Housing Act 50 of 1999.

Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

Prevention of Illegal Squatting Amendment Act 92 of 1976.

Promotion of Administrative Justice Act 2 of 2000.

Public Finance Management Act 1 of 1999.

South African Human Rights Commission Act 40 of 2013.

South African Police Service Act 65 of 1995.

State Liability Act 20 of 1957.

State Liability Amendment Act 14 of 2011.

Supreme Court Act 59 of 1959.

Subordinate legislation

The Expropriation Bill (draft) in GN 63 *GG* 38418 of 26-01-2015.

Internet sources

The Council of Europe/European Court of Human Rights "Guide on Article 6: The right to a fair trial" (2013) 51-52 <http://www.echr.coe.int> (accessed 30-05-2016).

International Instruments

European Convention on Human Rights 1950 ETS 5; 213 UNTS 221.

International Covenant on Economic, Social and Cultural Rights (1966) 6 ILM 360.